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HISTORY

OF THE

LAW OF NATIONS

IN EUROPE AND AMERICA;

FROM THE EARLIEST TIMES TO THE

TREATY OF WASHINGTON, 1842.

~~~~~

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## PREFACE.

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THIS work was originally written and published in the French language as a *Mémoire* in answer to the following prize question proposed by the Academy of Moral and Political Sciences in the Institute of France : “ *Quels sont les progrès qu’a fait le droit des gens en Europe depuis la Paix de Westphalie ?* ” In rendering it into our language the author has considerably enlarged the work, especially the introductory part relating to the history of the European law of nations previous to the peace of Westphalia. He has also subjoined a summary account of the international relations of the Ottoman Empire with the other European states, of the recent transactions relating to the interference of the great powers in the affairs of Greece and Egypt, and of the discussions between the United States and Great Britain, relating to the right of search as applicable to the African slave trade, terminated by the treaty of Washington in 1842. It has been very justly observed that “ international law is founded only on the opinions generally received among civilized nations, and its duties are enforced.

only by moral sanctions : by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility and incurring its probable evils, in case they should violate maxims generally received and respected."\* Yet experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of those rules of justice between states which are dictated by international morality, although they are deficient in that more perfect sanction annexed by the law-giver to the observance of a positive code proceeding from the command of a superiour. The history of the progress of the science of international jurisprudence cannot, therefore, fail to be of the highest interest, when connected with the history of the variations in that more positive system resulting from special compacts, by which the general rules founded on reason and usage have been modified and adapted to the various exigencies of human society. The author has endeavored to trace the progress of both these systems, as marked in the writings of public jurists, in judicial decisions, in the history of wars and negotiations, in the debates of legislative assemblies, and in the text of treaties, from the earliest times of classic antiquity to the most recent public transactions between the states of Europe and of America. He believes that the general result will show a considerable advance, both in the theory of international morality, and in the practical observance of the rules of justice among states, although this advance may not entirely correspond with the rapid progress of civilization in other respects. The work is now submitted by the

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Austin, Province of Jurisprudence determined, pp. 147-148.

PREFACE.

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author to the judgment of his own country, as a contribution to the history of this branch of science, in the hope that it may be of some use in guiding the inquiries of others in a field of knowledge so important to the jurist, the statesman, and the philanthropist.

BERLIN, Nov. 1843.





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# INTRODUCTION.

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SKETCH OF THE HISTORY OF THE LAW OF NATIONS IN  
EUROPE FROM THE EARLIEST TIMES TO THE PEACE OF  
WESTPHALIA, 1648.

THE laws or customs by which the mutual intercourse of European nations was regulated previous to the introduction of Christianity were founded on the prejudices which regarded the different races of men as natural enemies. With the ancient Greeks and Romans the terms Barbarian, Stranger, and Enemy were originally synonymous. Nothing but some positive compact exempted the persons of aliens from being doomed to slavery the moment they passed the bounds of one State and touched the confines of another. And though, according to the Roman law, in its more improved state, an alien with whose country the relations of friendship and hospitality did not exist, was not technically considered an enemy—*hostis*; yet his person might lawfully be enslaved, and his property confiscated, if found on the Roman territory.\* During the

International law of the ancient States of Greece and Italy.

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\* Si cum gente aliqua, neque amicitiam, neque hospitium, neque fœdus amicitie causa factum habemus; hi *hostes* quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit: et *liber noster ab eis captus, servus fit, et eorum*. Idemque est si ab illis ad nos aliquid perveniat. Hoc quoque igitur casu, postliminium datum est. (Dig. l. 49, t. 15, l. 5.)

heroic age of Greece, piracy was universally practiced. So late as the age of Solon, the Phoceans, on account of the sterility of their soil, were forced to roam the seas as pirates, which says the historian was considered in those times an honorable profession.<sup>b</sup> That legislator tolerated, whilst he regulated the association of sea-rovers, which he found established by inveterate usage. The Etruscans, from whom the Romans derived their arts and institutions, were notorious sea-rovers who infested the Mediterranean with their piracies.<sup>c</sup> And Polybius relates that the Romans imposed upon the Carthagenians, as a condition of peace, the stipulation that they should not sail beyond cape Pelorus, either for the purposes of trade or piracy. The extreme ferocity of the usages of war which prevailed among the Greeks of the heroic age is attested in the poems of Homer, which, whatever theory may be adopted as to their origin, must be considered as a faithful record of the manners of the times to which they refer. Quarter seems never to have been given in battle except with a view to the ransom of the prisoner. Hostility was not satisfied with taking the life of an enemy and stripping off his armor: the naked corpse became the object of an obstinate struggle between the combatants; if it remained in the power of the adverse party, it was deprived of burial, and exposed to the beasts and birds of prey; and was not unfrequently mutilated. It was indeed only the chiefs that were subject to such barbarous treatment: an armistice was usually granted to the defeated party for the purpose of celebrating the obsequies of their friends.<sup>d</sup> But the indignities offered by Achilles to the body of Hector were not a singular example of hostile rage: for Hector himself intended to inflict similar outrages on the corpse of Patro-

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<sup>b</sup> Plerumque etiam latrocinio maris, quod illis temporibus gloriæ habebatur, vitam tolerabant. (Just. Hist. l. xliii. cap. iii. n. 3.)

<sup>c</sup> Niebuhr, Römischer Geschichte, I B'ch, ss. 129, 132.

<sup>d</sup> Homer II. vii. 409.

clus :<sup>e</sup> and it is mentioned as a signal mark of respect paid by Achilles to Eetion, whose city he had sacked, that after slaying him, he abstained from spoiling his remains, and honored them with funeral rites. In the case of a captured city the sanctuaries of the gods sometimes afforded an asylum which was respected by the victors. Thus Maro, the priest of Apollo, was saved with his family from the common destruction in which the Cyconians of Ismarus were involved by Ulysses ; for he dwelt within the precincts sacred to the god, and was therefore allowed to redeem himself by the payment of a heavy ransom. With this exception, all the males capable of bearing arms were exterminated : the women and children were dragged into captivity to be divided among the victors as the most valuable part of the booty.<sup>f</sup>

With the ancient nations of Greece and Italy, law, both public and private, so far as depending on penal sanctions, was exclusively founded on religion. The guilty were condemned by devoting them to the infernal deities. This sentence was pronounced against a whole people as well as against individuals. War was the judgment of heaven. The heralds, by whom it was declared, devoted the enemy, and invoked his deities to desert the walls of the hostile city. The vanquished were considered as abandoned by the gods. Hence they might lawfully be put to death by the victors. To reduce them to slavery was consequently considered as a mitigation of the extreme right of war.<sup>g</sup>

During the first Persian war, the heralds who were sent by Darius to Athens and Sparta to demand earth and water, in token of submission to the "great king" were put to death with cruel mockery. This was, however, considered as a breach of the international law acknowledged between

*see also*  
Laws of war  
observed dur-  
ing the Per-  
sian and Pelo-  
ponesian wars.

<sup>e</sup> Homer II. xviii. 176.

<sup>f</sup> Thirlwall's Hist of Greece, vol. i. pp. 181, 182.

<sup>g</sup> Vico, Scienza nuova, l. iv. c. 4.



the Greeks and Barbarians as founded on religion. On the side of the Persian invaders the war was carried on by ravaging the Grecian territory. The fields were laid waste, the cities with their fanes were plundered, burnt, and razed to the ground. The inhabitants, men, women, and children were swept into captivity. During the Peloponesian war the Spartans and Athenians rivalled each other in acts of cold blooded cruelty. This long protracted contest for supremacy between the two leading states of Greece partook of the ferocity and lawlessness which have ever characterized civil war. Even during a suspension of actual hostilities, the relations between the different Grecian communities were far from denoting a state of settled peace guaranteed by the sanctions of public law. The internal repose of each particular state was constantly disturbed by the deadly feuds of its political factions. "We find it difficult to comprehend and believe," says Niebuhr, "in the existence of the spirit with which the ancient oligarchies maintained the power they at all times abused; that spirit, however, is sufficiently manifest in the oath they exacted in some of the Grecian states from their members, to bear malice against the commons, and to devise all possible harm against them."<sup>h</sup> This oath was still taken in the time of Aristotle by the members of the ruling body in some of the Grecian oligarchies. Their hatred was amply retorted in acts of vengeance inflicted by the democracy on those whom they justly considered as their mortal enemies. The Lacedemonian government was the avowed patron of the oligarchy in every city; and as the popular party naturally looked up to Athens for support, and there was no supreme federal authority adequate to check and control these rival powers, they kept every other state in continual commotions and furious disorders, which reduced them to

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<sup>h</sup> Καὶ τῷ δήμῳ κακόνους ἔσονται, καὶ βουλευτέῳ δ' ἑ γι ἂν ἔχω κακόν. Arist. Pol. v. 7, 10.

misery, and thinned their population by continual proscriptions, banishments, and massacres.<sup>i</sup>

The superiority of the Hellenic race to all other nations was an axiom assumed by them as requiring no proof. The acutest of their philosophers infers from this axiom that the Barbarians were intended by nature to be the slaves of the Greeks, and that it was lawful to make them so either by force or fraud. The Greeks termed those who were connected with them by compact, *ἑσπευμένοι* literally those with whom they had poured out libations to the gods. Those who were not entitled to claim the benefit of the alliance thus sanctioned by religion were called *ἑσπευμένοι* that is, what we should term out-laws. It appears to have been a received maxim among them that men were bound to no duties towards each other except in virtue of an express compact.<sup>k</sup> Thucydides has stated the maxim constantly observed by his countrymen that "to a king or commonwealth nothing is unjust which is useful." A similar principle was openly avowed by the Athenians in their celebrated reply to the people of Melos. Aristides distinguished, in this respect, between public and private morality, holding that the rules of justice were to be sacredly observed between individuals, but as to political affairs expediency might be substituted in their place. He accordingly scrupled not to invoke upon his own head the guilt and expiation of a breach of faith which he advised the Athenian people to commit in order to promote their national interests.<sup>m</sup> Plutarch indeed relates an apochryphal story of a design formed by Themistocles to burn the united fleet

International  
morality of the  
Greeks.

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<sup>i</sup> Hume's Essays, xi. On the populousness of ancient nations:

<sup>j</sup> Arist. Polit. cap. viii.

<sup>k</sup> Mitford's Hist. of Greece, vol. i. ch. 15, § 7.

<sup>l</sup> Thucyd. Hist. lib. vi. Ἀπόροι καὶ τωράννω ἢ πόλις ἐχέσθαι οὐκ ἐλογον δ τὶ σφάλλεσθαι.

<sup>m</sup> Theophrast apud Plutarch in Aristidem.

of the Grecian states allied with Athens after the retreat of Xerxes, which the Athenian people refused to sanction, because Aristides had declared that though highly advantageous, it was unjust. "Such regard," says Plutarch "had that people for justice, and such implicit confidence in the integrity of Aristides."<sup>a</sup> The same account is repeated by Cicero, with this variation, that the design of Themistocles was directed against the Spartan fleet only; and he contrasts the conduct of his countrymen with that of the Athenians on this occasion. "The Athenians thought," says he, "that an unjust measure could not be expedient, and therefore rejected the proposition before they knew what it was, upon the authority of Aristides alone. They acted more wisely than we Romans, who grant impunity to pirates and oppress our allies with exactions."<sup>o</sup> But this compliment, which Cicero pays to the Athenians at the expense of his own countrymen, is quite irreconcilable with the uniform conduct of the former on all other occasions, and with the more trust worthy authority of Theophrastus quoted by Plutarch as to the distinction maintained by Aristides between private and political morality.

Conduct of  
the Spartans  
on the surren-  
der of Plataea.

The true nature of the laws of war practiced by the Greeks towards each other may be illustrated by two remarkable transactions selected from a multitude of similar cases which occurred during the Peloponesian war. The first of these relates to the conduct of the Spartans on the surrender of Plataea. The Plataeans were allies of Athens and enemies of Thebes, which last state was the ally of Sparta. We borrow from a modern historian of Greece the account of the circumstances as abridged by Mr. Thirlwall, from the narrative of Thucydides.

"By this time the remaining garrison of Plataea was reduced to the last stage of weakness. The besiegers might

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<sup>a</sup> Plutarch in Aristidem.

<sup>o</sup> Cic. de offic. lib. iii. s. ii.

probably long before have taken the town without difficulty by assault. But the Spartans had a motive of policy for wishing to bring the siege to a different termination. They looked forward to a peace which they might have to conclude upon the ordinary terms of a mutual restitution of conquests made in the war. In this case, if Plataea fell by storm, they would be obliged to restore it to Athens; but if it capitulated, they might allege that it was no conquest. With this view their commander protracted the blockade, until at length he discovered by a feint attack that the garrison was utterly unable to defend the walls. He then sent a herald to propose they should surrender, not to the Thebans, but to the Spartans, and on condition that Spartan judges alone should decide upon their fate. These terms were accepted, the town delivered up, and the garrison, which was nearly starved, received a supply of food. In a few days five commissioners came from Sparta to hold the promised trial. But instead of the usual forms of accusation and defence, the prisoners found themselves called upon to answer a single question: whether in the course of the war they had done any service to Sparta and her allies. The spirit which dictated such an interrogatory was clear enough. The prisoners however obtained leave to plead for themselves without restriction; their defence was conducted by two of their number, one of whom, Laco son of Aimnestus, was *proxenus* of Sparta.

“The arguments of the Plataean orators, as reported by Thucydides, are strong, and the address which he attributes to them is the only specimen he has left of pathetic eloquence. They could point out the absurdity of sending five commissioners from Sparta to inquire whether the garrison of a besieged town were friends of the besiegers; a question which if retorted upon the party which asked it, would equally convict them of a wanton aggression. They could appeal to their services and sufferings in the Persian war, when they alone among the Bœotians remained constant to the cause of Greece, while the Thebans had fought

on the side of the Barbarians in the very land which they now hoped to make their own with the consent of Sparta. They could plead an important obligation which they had more recently conferred on Sparta herself, whom they had succored with a third part of their whole force, when her very existence was threatened by the revolt of the Messenians after the great earthquake. They could urge that their alliance with Athens had been originally formed with the approbation, and even by the advice of the Spartans themselves ; that justice and honor forbade them to renounce a connexion which they had sought as a favor, and from which they had derived great advantages ; and that, as far as lay in themselves, they had not broken the last peace, but had been treacherously surprised by the Thebans, while they thought themselves secure in the faith of treaties. Even if their former merits were not sufficient to outweigh any later offence which could be imputed to them, they might insist on the Greek usage of war which forbade proceeding to the last extremity with an enemy who had voluntarily surrendered himself ; and as they had proved, by the patience with which they had endured the torments of hunger, that they preferred perishing by famine to falling into the hands of the Thebans, they had a right to demand that they should not be placed in a worse condition by their own act, but if they were to gain nothing by their capitulation, should be restored to the state in which they were when they made it.

“But unhappily for the Platæans, they had nothing to rely upon but the mercy or the honor of Sparta : two principles which never appear to have had the weight of a feather in any of her public transactions ; and though the Spartan commissioners bore the title of judges, they came in fact only to pronounce a sentence which had been previously dictated by Thebes. Yet the appeal of the Platæans was so affecting, that the Thebans distrusted the firmness of their allies, and obtained leave to reply. They very judiciously and honestly treated the question as one

which lay entirely between the Plateans and themselves. They attributed the conduct of their ancestors in the Persian war to the compulsion of a small dominant faction, and pleaded the services which they had themselves since rendered to Sparta. They depreciated the patriotic deeds of the Plateans, as the result of their attachment to Athens, whom they had not scrupled to abet in all her undertakings against the liberties of Greece. They defended the attempt which they had made upon Plataea during the peace, on the ground that they had been invited by a number of its wealthiest and noblest citizens, and they charged the Plateans with a breach of faith in the execution of their Theban prisoners, whose blood called as loudly for vengeance as they for mercy.

"These were indeed reasons which fully explained, and perhaps justified, their own enmity to Plataea, and did not need to be aided by so glaring a falsehood, as the assertion, that their enemies were enjoying the benefit of a fair trial. But the only part of their argument that bore upon the real question, was that in which they reminded the Spartans, that Thebes was their most powerful and useful ally. This the Spartans felt; and they had long determined that no scruples of justice or humanity should endanger so valuable a connexion. But it seems that they still could not devise any more ingenious mode of reconciling their secret motive with outward decency, than the original question which implied that if the prisoners were their enemies, they might rightfully put them to death; and in this sophistical abstraction all the claims which arose out of the capitulation, when construed according to the plainest rules of equity, were overlooked. The question was again proposed to each separately, and when the ceremony was finished by his answer or his silence, he was immediately consigned to the executioner. The Plateans who suffered amounted to two hundred; their fate was shared by twenty-five Athenians, who could not have expected or claimed milder treatment, as they might have been fairly excepted from

the benefit of the surrender. The women were all made slaves. If there had been nothing but inhumanity in the proceeding of the Spartans, it would have been so much slighter than that which they had exhibited towards their most unoffending prisoners from the beginning of the war, as scarcely to deserve notice. All that is very signal in this transaction, is the baseness of their cunning, and perhaps the dullness of their invention."†

Conduct of  
the Athenians  
on the surren-  
der of Melos.

The conduct of the Athenians on the surrender of Melos is stated as follows, by the same able historian, who remarks that Thucydides, in his account of the negotiations which preceded the surrender, "has composed a dialogue, such as from his knowledge of the views and feelings of the parties, he conceived might have passed on this occasion; for there seems to be no ground for attributing to it any greater degree of historical truth." Still it is evident from the crowning act of cruelty with which the scene was closed, that the language put into the mouths of the interlocutors, contains a faithful expression of the maxims of international morality recognized by them.

"The Athenians, at the outset, lay down the grounds on which they propose to argue the question. They reject all appeals to justice as distinct from political expediency; not because they are conscious of a flagrant wrong, but because they have made up their minds on this head, and wish to prevent a waste of words. They do not charge the Melians with any offence, or pretend to deny, that though colonists of Lacedæmon, they had not so much as taken part in any of her expeditions; and the Melians were willing to engage to observe a strict neutrality for the future. But the power of Athens depended on the maintenance of a system, which was inconsistent with the independence of Melos. Her empire was in a great measure founded on opinion; and its stability would be endangered

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† Thirlwall's Hist. of Greece, vol. iii. pp. 192. 196.

if it was observed that a single island might defy her with impunity. For the world would not give her credit for such singular moderation as willingly to abstain from a conquest which lay within her reach ; but would certainly attribute her acquiescence to a sense of weakness. She was following what seemed to be the universal law of nature, in securing and strengthening her dominion, and had reason to hope that her conduct was no less conformable to the will of the gods, than it was sanctioned by the uniform practice of mankind. The Melians vainly endeavored to prove that the interest of Athens herself required that their neutrality should be respected, on the ground that other independent states would be alarmed and provoked by such an aggression as they were now threatened with ; an argument which could only have been cogent if Athens had had a reputation for equity and moderation to maintain. The question therefore was reduced to a simple point, whether the Melians could gain any thing by resistance. And the Athenian speaker intimates to them, that their resistance, if unsuccessful, would involve them in the most dreadful calamities. They acknowledge that beside the chances of war, and the favor of the gods towards a righteous cause, they have no ground of hope but the assistance which they are entitled to expect from the parent state. They will not believe that Sparta will suffer a colony which had been true to her for seven hundred years to fall the victim of its fidelity : that even if she cannot find means of sending an armament across the sea to their relief, she will not make an effectual diversion in their behalf, either by a fresh invasion of Attica, or by an expedition like that of Brasidas. The Athenian in vain endeavors to correct the error into which they seem to have fallen with regard both to Sparta and to Athens. He asserts as a notorious fact—and the Melians do not deny it—that of all states, Sparta is that which has most glaringly shown by her conduct, that in her political transactions she measures honor by inclination, and justice by expediency. She might therefore be ex-



pected, instead of being swayed by the fair names of piety or generosity, calmly to calculate the danger to which she would expose herself by the effort which would be necessary for the deliverance of a weak unprofitable island. On the other hand Athens had sufficiently shown by many examples, that she would not be deterred or diverted from her purpose by threats, or by any attack made upon her in another quarter.

"The envoys withdrew, that the Melians might deliberate on their final answer; and when they were called in again, they were informed that the Melians would not so despair of their fortune, or distrust their natural allies, as all at once to renounce an independence of seven centuries: but they repeated their offer of neutrality, and a fair compromise. The Athenians, as they withdrew, expressed their surprise at the singular infatuation which was hurrying the Melians to inevitable ruin. The siege of the town was immediately begun, and the bulk of the armament did not withdraw until it was closely blockaded both by sea and land.

"The threats of the Athenians were accomplished; the hopes of the Melians proved baseless. It does not appear that so much as a thought was entertained at Sparta of stirring for their relief. The Spartans were too much occupied by the incursions with which about this time the Athenian garrison at Pylus was infesting their territory; and even these they only resented by permitting individuals to make reprisals on Athenian property. They neither aided Corinth, when on some private quarrel it renewed hostilities with Athens, nor seconded the efforts of the Argive exiles; the sacrifices, it was alleged, did not permit them to cross the border. The Melians, left to their own resources, made a gallant resistance. Twice they succeeded in surprising a part of the Athenian lines, and introduced some supplies into the town. But toward the end of 416 a reinforcement was sent from Athens to the camp of the besiegers. As the place was pressed more closely, and the miseries of the siege began to be more generally

felt, symptoms of disaffection appeared within the walls, and the dread of treachery hastened the fall of the town, which surrendered at discretion.

"And now the Athenians crowned their unjust aggression with an act of deliberate cruelty. They put to death all the adult citizens, and enslaved the women and children. It would seem from the threats which Thucydides puts into the mouth of the Athenian speaker in the conference, that the same decree which ordered the expedition had also fixed the punishment to be inflicted on the Melians, if they resisted; as had been done in the case of Scione. In either case the guilt of proposing, or at least of supporting the inhuman decree, is laid to the charge of Alcibiades, whom we thus find sanctioning and even out doing the most hateful acts of Cleon's atrocities. For the case of Melos differed widely from those of Scione and Mitylene. The Athenians themselves were conscious that they had not the shadow of a right to the island; and even if the conquest had been really necessary for the security of their empire, the utmost straining of the tyrant's plea could not palliate the extermination of the inhabitants. Indeed it seems probable that they, and especially Alcibiades, were instigated to this deed rather by their hatred of Sparta, than by any abstract principle, or by resentment against the Melians themselves.

"The language of the Athenians in the conference at Melos has been often thought to indicate an extraordinary degree of moral obliquity, and has been attributed to the pernicious influence of the sophists; and perhaps it is true that their doctrines lie at the bottom of the whole argument. But on the other hand it may be observed that the Athenian speaker only rejects the obligations of justice as a rule in political transactions, and that the expediency to which he professes to sacrifice it is the good of the state. Further than this the question did not lead him; and this conclusion, though quite untenable in theory, seems to flow from the idea which generally prevailed among the ancients, as

to the paramount claims of the public interest over every other consideration. The conduct of the Athenians in the conquest of Melos is far less extraordinary than the openness with which they avow their principles. But, unjust as it was, it will not to a discerning eye, appear the more revolting, because it wanted that varnish of sanctity, by which acts of much fouler iniquity have been covered in ages which have professed to revere a higher moral law. Their treatment of the vanquished whatever may have been its motive—was unworthy of a civilized nation. Yet some allowance may fairly be claimed for the general rigour of the ancient usages of war. The milder spirit of modern manners would not have punished men who had been guilty of no offence but the assertion of their rightful independence, more severely than by tearing them from their families, and locking them up in a fortress, or transporting them to the wilds of Scythia. But our exultation at the progress of humanity may be consistent with a charitable indulgence for the imperfections of a lower stage of civilization.”<sup>a</sup>

Outlines of  
Grecian public  
law.

A learned modern writer has enumerated the following points as constituting the rude outlines of the public law observed among the Grecian states. 1. The rights of sepulture were not to be denied to those slain in battle. 2. After a victory no durable trophy was to be erected. 3. When a city was taken, those who took refuge in the temples could not lawfully be put to death.<sup>r</sup> 4. Those guilty of sacrilege were denied the rights of sepulture. 5. All the Greeks were allowed, in time of war as well as peace, to consult the oracles, to resort to the public games and temples, and to sacrifice there without molestation.<sup>s</sup>

Amphyctio-  
nic council.

These limitations of the extreme rights of war were en-

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<sup>a</sup> Thirlwall's Hist. of Greece, Vol. iii. pp. 358, 362.

<sup>r</sup> Yet the Orchomenians who had taken refuge in a temple after the capture of their city by Cassander were all massacred, *κατὰ τὰ κοινὰ Ἑλλήνων νόμιμα*, says Diodorus, l. xix. 63.

<sup>s</sup> Saint-Croix, anciens Gouvernemens fédératifs, p. 51.

forced by the council of the Amphyctions, which however was a religious rather than political institution, and as such took cognizance of international offences against the laws and customs sanctioned by the national superstition.<sup>†</sup>

The exclusively religious character of the Amphyctionic confederacy is also asserted by the same able historian above quoted. "The original objects," says he, "or rather the essential character of the institution, seem to be faithfully expressed in the terms of the oath, preserved by *Æschines*, which bound the members of the league to refrain from utterly destroying any Amphyctionic city, and from cutting off its supply of water, even in war, and to defend the sanctuary and the treasures of the Delphic god from sacrilege. In this ancient and half-symbolical form we perceive two main functions assigned to the council; to guard the temple, and to restrain the violence of hostility among Amphyctionic states. There is no intimation of any confederacy against foreign enemies, except for the protection of the temple; nor of any right of interposing between members of the league, unless where one threatens the existence of another. It is true, that this right, though expressly limited to certain extreme cases, might have afforded a pretext for very extensive interference, if there had been any power capable of using it; but so far was the obligation of the oath from being strained beyond its natural import, that no period is known when it was enforced even in its simplest sense. The object of mitigating the cruelty of warfare among the Amphyctionic tribes was either never attained, or speedily forgotten. In the historical period, the remembrance of the oath seems never to have withheld any of the confederates from inflicting the worst evils of war upon their brethren; much less could it introduce a more humane spirit into the nation."<sup>‡</sup>

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<sup>†</sup> *Saint-Croix, anciens Gouvernemens fédératifs*, p. 51.

<sup>‡</sup> *Thirlwall's Hist. of Greece*, vol. i. pp. 360, 361.

Theory of  
the balance of  
power among  
the ancient  
nations.

It has been questioned whether the ancient nations had any idea of a systematic arrangement, such as has been established in modern times, for securing to different states within the same sphere of political action, the undisturbed possession of their independence and existing territories. Hume has attempted to show that the system of the balance of power, if not reduced to a formal theory, was at least practically adopted by the ancient states of Greece and the neighboring nations.<sup>v</sup> In support of this idea, he states that Thucydides represents the league formed against Athens, previous to the Peloponnesian war, as an application of this principle. After the decline of Athens, and when the supremacy over Greece was contested between the Lacedemonians and Thebans, we find, says he, that the Athenians endeavored to preserve the balance by throwing themselves into the lighter scale. They supported Thebes against Sparta, until the victory of Epaminondas at Leuctra gave the ascendancy to the former; after which they immediately went over to the conquered, from generosity, as they pretended, but, in reality, from their jealousy of the conquerors.<sup>w</sup>

Demosthenes, in his oration for the Megapolitans, lays down the maxim that the interest of Athens required that both Sparta and Thebes should be weak. But the situation of Thebes at this juncture was very critical, and it was apprehended that she might sink in the contest she was then prosecuting with her rival. On the other hand, if Sparta succeeded against Megapolis, she would find it less difficult to reduce Messene; and this addition to her strength when that of Thebes was impaired, would destroy the balance between the two leading states which it must be the interest of Athens to preserve. On these grounds

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<sup>v</sup> Hume's *Essays*, vii. on the balance of power.

<sup>w</sup> Xenoph. *Hist. Greece*, l. vi. vii.

the orator supported the proposal of alliance with Megapolis.

The Athenians rejected the advice of their great statesman; and his efforts to arouse, both his own countrymen and the other states of Greece, to the new danger which he discovered in the first rise of the Macedonian power were unsuccessful until it became too late to resist the progress of Philip. His endeavors to form such a general confederacy as would have effectually checked the designs of that ambitious and able prince finally resulted in a league between Athens and Thebes. The Dorian states looked on as passive spectators whilst the liberties of Greece were destroyed in the plains of Chæronea.

Demosthenes would have included even the king of Persia in a general alliance against Macedon. The "great king" was in reality a petty prince in comparison with the leading Grecian states, considering the moral superiority which discipline, valor, and science gave them over the Barbarians. The Persian monarchs therefore constantly followed the advice given to Tissaphernes by Alcibiades to support the weaker party in the intestine wars of Greece. An adherence to this maxim prolonged nearly a century the existence of the Persian empire, until its momentary neglect when the aspiring genius of Philip first appeared on the scene, brought that lofty and frail edifice to the ground, with a rapidity of which there are few instances in the history of mankind.

The successors of Alexander pursued the same policy originally observed by the Persian monarchs. The Grecian dynasties established in Asia and Africa considered Macedon as their only formidable military rival. The Ptolemies, in particular, first supported the Achæan league and then Sparta, with the sole view of counterbalancing the power of the Macedonian monarchs.\* A greater dan-

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\* Polyb. Hist. l. ii. c. 51.

ger soon menaced all the states founded by the successors of Alexander from the growing power and insatiable ambition of Rome. The three potent kingdoms of Egypt, Syria, and Macedon, had they been combined with the minor Grecian republics who still retained their independence, might certainly have formed a confederacy adequate to present an effectual barrier to the Roman conquests. Hannibal's invasion of Italy occasioned a remarkable crisis which ought to have fixed the attention of all civilized nations. It then became manifest that the contest between Rome and Carthage was for universal empire, and this fact was even noticed in the speech of Agelaus of Naupactum in the general congress of Greece.<sup>7</sup> Yet none of the states so deeply interested in the issue made any attempt to interfere. Philip II. of Macedon remained neutral until he saw Hannibal victorious, and then most imprudently formed an alliance with the conqueror upon terms still more imprudent. This monarch stipulated that he would assist the Carthagenians in the conquest of Italy; after which, they agreed to send over forces into Greece to assist him in subduing the Grecian republics.<sup>8</sup> At the end of the second Punic war, Carthage became entirely dependent upon Rome, and that aspiring state was enabled to turn its exclusive attention towards the Grecian world where a new career of conquest was opened to view. So far from combining to make a joint resistance, the states of the secondary order assisted Rome in subduing the more powerful, and from the character of allies gradually sunk into that of subject provinces. Even the republic of Rhodes and those states composing the Achæan confederation, so much celebrated by ancient historians for their wisdom, pursued this ruinous policy. The only Greek prince, having relations with Rome, who seems to have been sensible of the necessity of

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<sup>7</sup> Polyb. Hist. l. v. c. 104.

<sup>8</sup> Liv. Hist. l. xxiii. c. 33.

preserving the balance of power, was Hiero II. king of Syracuse. Though professedly the ally of Rome, he sent assistance to the Carthagenians during the servile war: "esteeming it requisite," says Polybius, "both in order to retain his dominions in Sicily, and to preserve the Roman friendship that Carthage should be safe; lest by its fall the remaining power should be able, without contrast or opposition, to execute every purpose and undertaking. And here he acted with great wisdom and prudence. For that is never, on any account to be overlooked; nor ought such a force ever to be thrown into one hand, as to incapacitate the neighboring states from defending their rights against it."<sup>a</sup>

It is evident that the modern principle of interference to preserve the balance of power is here distinctly laid down by the historian. Hume's conclusion is that "this maxim is founded so much on common sense and obvious reasoning, that it is impossible it could altogether have escaped antiquity, where we find, in other particulars, so many marks of deep penetration and discernment. If it was not so generally known and acknowledged as at present, it had at least, an influence on all the wiser and more experienced princes and politicians." And indeed, even at present, however generally known and acknowledged among speculative reasoners, it has not, in practice, an authority much more extensive among those who govern the world."<sup>b</sup>

The generality of this conclusion must, however, be limited by the two great leading historical facts above referred to, that the principle of interference to preserve the balance of power, though admitted in the reasonings of statesmen and historians, was not practised with sufficient constancy in ancient times to prevent the aggrandizement, first of Macedonia and then of Rome, at the expense of all other civilized

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<sup>a</sup> Polyb. Hist. l. i. c. 83.

<sup>b</sup> Hume's *Essays*, viii.



states. In modern times it has not only been acknowledged by speculative reasoners, but has been incorporated into the international code, and though often abused in practice so as to furnish the pretext for unjust and impolitic wars, has more than once saved Europe from universal monarchy.

Cicero's theory of international morality.

Cicero's theory of the rules of justice applicable between independent societies of men seems to have been more liberal than that of the Grecian statesmen and philosophers. According to him, the wickedness of man frequently renders it necessary to use violence against our fellow creatures and to resist force by force. Thus when we have to deal with criminals, we are to avail ourselves of penal law, but when with public enemies we must resort to war. The former remedy should bear a due proportion to the nature of the crimes committed ;<sup>c</sup> the latter, to be just, ought to be necessary.<sup>d</sup> In private life, we ought perhaps to be satisfied with the repentance of an enemy, testified in such manner as to render impossible fresh aggression on his part, and to intimidate others from committing the like offence. In public relations, the laws of war are to be strictly observed. For there are two modes of settling controversies, one by discussion, the other by a resort to force. The first is proper to man, the second to brutes ; and ought never to be resorted to except where the former is unavailable. The sole object of war is to enable us to live undisturbed in peace ; and victory spares the conquered, unless they have forfeited their title to forbearance by first violating the laws of war in practising cruelty. Thus the old Romans accorded the political rights of the city to the Tusculans, Sabines, and others ; but they razed to the ground Carthage and Numantia. The destruction of Corinth was certainly to be regretted, but the severe conduct of the

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<sup>c</sup> Cic. de Leg. iii. 20.

<sup>d</sup> Cic. de Offic. i. 11.

Romans towards that city was explained by the fact of its local position favoring a renewal of the war. According to Cicero's opinion, however, an offer of peace, which has nothing insidious in its terms, ought never to be refused. It is not only a duty to spare the vanquished, but to give quarter to the garrison of a besieged town offering to surrender after a breach made in the walls. He asserts that this rule had been so scrupulously observed by his countrymen that those generals who had received the submission of conquered cities or nations became their patrons according to the ancient law and custom. He goes on to state that the principles of justice applicable to a state of war were expressly sanctioned in the feacial law of the Roman people. In order to render a war just, this law required that it should be waged for a just claim, and previously declared in due form. He then adduces, as a proof of the strictness which was observed in legalizing acts of war, the example of M. Cato, who exhorted his son, who had been previously serving in a legion which was reformed, not to engage in battle with the enemy without taking a new military oath.\*

He also remarks that in order to designate an enemy the term *hostis* had been substituted for the proper term *perduellis*, so as thus to palliate an odious meaning by a milder expression. "Our ancestors," says he, "called him *hostis* whom we call *peregrinus*. This is proved by the text of the XII tables: AUT STATUS DIES CUM HOSTE. So also, ADVERSUS HOSTEM ETERNA AUCTORITAS. What can add," he exclaims, "to the mildness of this expression? to call him with whom you wage war by so pacific a name?" It was true that time had rendered this epithet harsh: it had been detached from that of foreigner, and was only applied to that of an enemy in the true sense of the word.

A nation, he continues, contending with another for em-

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\* De offic. i. 11.

pire and for glory ought to be governed by those principles which constitute just causes of war. The mutual animosity of the belligerent parties ought there, even, to be tempered by the nobleness of the cause. The Romans waged war with the Cimbri for their very existence; whilst with the Samnites, Carthaginians, and Pyrrhus they fought for empire. Carthage was perfidious, and Hannibal was cruel; but with the others they found a stronger sense of justice. And he quotes the words of the old poet Ennius to prove the generosity with which Pyrrhus even restored his prisoners without ransom.

Nec mi aurum posco, nec mi pretium dederitis;  
Nec cauponantes bellum, sed belligerantes,  
Ferro, non auro, vitam cernamus utrique.  
Vosne velit, an me regnare hera, quidve ferat, Fors,  
Virtute experiamur: et hoc simul accipite dictum;  
Quorum virtuti belli fortuna pepercit,  
Eorundem me libertati parcere certum est;  
Domo, ducite, doque, volentibu' cum magnis Diis.<sup>f</sup>

Faith was to be kept even with an enemy. As examples of the sacredness of this maxim he cites the case of Regulus returning to Carthage, and of the Roman senate surrendering to Pyrrhus the traitor who had offered to poison his royal master.<sup>g</sup> The observance of this rule distinguishes just wars from those offences against humanity which proceed from pirates and robbers. Towards the latter, promises, even sanctioned by an oath, are not binding: for an oath binds only where it has been taken under a conscientious conviction of the right to exact it. Thus if you refuse to pirates the stipulated ransom you are bound by oath to pay, there is neither fraud nor perjury; for a pirate is not to be considered as a public enemy—*perduellis*—but the enemy of the human race. Between you and him there

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<sup>f</sup> De Offic. i. 12.

<sup>g</sup> Lib. i. 13. iii. 22. 27—32.

can be nothing in common, neither the obligation of contracts, nor that of an oath. To refuse to perform such an engagement is not perjury, which consists in violating an oath lawfully administered and conscientiously taken. Regulus, on the other hand, could not, without being guilty of perjury, refuse to perform a compact made with a lawful enemy, between whom and the Romans the fecial law was mutually binding.<sup>a</sup>

The oblivion of these principles of justice and mercy by the Romans in their conduct towards other nations was, according to Cicero, the main cause of the decline and fall of the republic, which he affirms to have been well merited, and as it were awarded by the justice of the gods. "So long as the Roman people" says he, "maintained its empire by benefits, and not by injuries, so long as it carried on wars either to extend its empire, or in defence of its allies; those wars were terminated by acts of clemency, or of necessary severity. The senate was an asylum for kings, people, and nations. Our magistrates and generals placed their chief glory in protecting with justice and fidelity the provinces and allies. Thus Rome merited the name of patroness rather than that of mistress of the world. These usages and this discipline have long been gradually declining; and with the triumph of Sylla disappeared altogether. Indeed nothing could seem unjust towards allies, when citizens were treated with such cruelty. Thus he stained the injustice of his cause with a deeper dye by the injustice of his victory. The conqueror raised his *hasta* in the forum, and when he exposed to public sale the property of the most opulent and most virtuous citizens,

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<sup>a</sup> Regulus vero non debuit conditiones pactiones que bellicas et hostiles perturbare perjurio. Cum justo enim et legitimo hoste res gerebatur; adversus quem et totum jus feciale, et multa sunt jura communia. Quod ni ita esset, nunquam claros viros senatus victos hostibus deditisset. (Lib. iii. 29.)

declared that he merely sold the spoils of victory ! He was followed by a man who, in an equally impious cause, attended with a still more shameful victory, not only confiscated the property of individual citizens, but involved in the same calamity whole provinces and countries. After having thus desolated and ruined foreign nations, we have seen him carry in triumphal procession the image of Marseilles, as if to announce the destruction of the republic in his triumph over that faithful city, without whose aid none of our generals would have triumphed in the transalpine wars."<sup>i</sup>

The patriotic partiality of Cicero has indignantly drawn this strong contrast between the conduct of the Romans towards other nations, in the earlier period of the republic, and the degenerate age in which he lived. But history attests that the practice of his countrymen, in their intercourse with other nations, varied as much from his generous theory of international morality, as their religious faith differed from his sublime conceptions of the divine attributes. A great modern writer has clearly shown by what arts of crafty policy and flagrant injustice that people acquired dominion over so large a portion of the earth.<sup>k</sup> The intercourse of the Romans with foreign nations was but too conformable with their domestic discipline. Their ill adjusted constitution fluctuated in perpetual mutations, but ever preserved the character, impressed upon it by Rome's martial founder, of a state, the very law of whose being was perpetual war—whose unceasing occupation was the conquest and colonization of foreign countries. For more than seven centuries the Romans pursued a scheme of aggrandizement, conceived in deep policy, and prosecuted with inflexible pride and pertinacity, at the expense of all the useful pursuits and charities of private life. All solicitude for the

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<sup>i</sup> Lib ii. 8.

<sup>k</sup> Montesquieu, *Grandeur et Decadence des Romains*, ch. 6.

fate of their fellow citizens made captive in war, was disdained by their stern and crafty policy.

Hoc caverat mens provida Reguli  
 Dissentientibus conditionibus  
 Fœdis et exemplo trahenti  
 Perniciem veniens in œvum,  
 Si non periret immiserabilis  
 Captiva pubes.

The formal institution of the feacial law, with a college of heralds to expound and enforce it, which they borrowed from the Etruscans, was merely intended to give a regular sanction to the practice of war, and contributed but little to mitigate its enormities. The precepts of this code are strongly contrasted with the oppressive conduct of the Romans towards their allies, and their unjust and cruel treatment of their vanquished enemies. "Victory," in their expressive metaphorical language, "made even the *sacred* things of the enemy *profane*;" confiscated all his property, moveable and immoveable, public and private, doomed him and his posterity to perpetual slavery; and dragged his kings and generals at the chariot wheels of the conqueror, thus depressing an enemy in his spirit and pride of mind, the only consolation he has left, when his strength and power are annihilated.\* If there were occasional exceptions to the exercise of this extreme rigour and inhumanity they only serve to confirm the general character of the conquests achieved by the Romans, which were not unfrequently terminated by delivering over to the executioner the captive sovereigns as if they had been guilty of some crime in defending their country's independence.

No professed treatise of international law has been left us by any ancient writer. Neither the work of Aristotle Roman feacial  
law and *jus*  
*gentium*.

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\* See, among other examples the affecting picture drawn by Plutarch of the treatment of king Persius and his family at the triumph of Paulus Æmilius.

upon the laws of war, nor the institutes of the Roman fecial law have descended to modern times.<sup>1</sup> When the Romans called their fecial law the law of nations, *jus gentium*, we are not to understand from hence that it was a positive law, established by the consent of all nations. It was in itself only a civil law of their own; they called it a law of nations, because the design of it was to direct them how they should conduct themselves towards other nations in the hostile intercourse of war, and not because all other nations were obliged to observe it.<sup>2</sup> And the incidental notices which may be collected from the writings of the Roman lawyers of what they call the *jus gentium* concur in showing that the idea associated with this term was not that of a positive rule governing the intercourse between independent communities, but what has been since called the law of nature, or the rule of conduct that is observed, or ought to be observed by all mankind independent of positive institution and of compact. Hence it is always contrasted by these writers with the municipal law, *jus civile*, which regulated the private relations of individuals, and with the constitutional code, *jus publicum*, which regulated the internal government of the city.<sup>3</sup>

Thus Cicero, in laying down the rules of justice applicable to secret defects in an article exposed to sale, states that the vendor is bound in conscience to disclose those defects. "When you expose a house to sale which you wish to be rid of on account of its defects, your advertisement is a snare to the buyer unless these defects be disclosed. Although the usage of society attaches no odium to such conduct, and it may not be prohibited by positive statute, or by the civil law; nevertheless the law of nature forbids it. As I have often said, and cannot too often repeat, there

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<sup>1</sup> Grotius, de J. B. ac P. Proleg. § 36.

<sup>2</sup> Rutherford's Inst. Nat. Law, B. ii. ch. 9, § 10.

<sup>3</sup> Ompeda, Litteratur des Voelkerschts, 1 Bd. §§ 32-44.

is a society which includes all mankind. Within this general society is included another composed of men of the same race ; and within that, another still, consisting of the inhabitants of the same state. Thus our ancestors distinguished between the law of nations and the civil law. The civil law is not always the law of nations ; but the law of nations ought always to be the civil law.”<sup>o</sup>

A celebrated modern writer on the Roman law has explained the origin of this distinction as follows. When Rome had once established relations with the neighboring nations, the Roman tribunals were called upon to apply to foreigners, and consequently to acquire a knowledge of the law of those nations ; not only the particular law of each, but that common to several. The wider Rome extended her dominion, the more these relations multiplied, the more their circle enlarged, and hence originated the abstract idea of a law common to the Romans and to all other nations. The idea thus acquired, was not strictly correct, and the Romans did not deceive themselves as to the value of their induction. In the first place they were not acquainted with all the nations of the world, and then they did not give themselves the trouble to inquire whether every particular principle of the *jus gentium* was in fact recognized by all the nations with which they were acquainted. This character of generality once admitted, its origin was sought for and was found in natural reason, that is in the notions of justice common to all men, from whence resulted as a necessary consequence the immutability of this law.

If the national law of the Romans be compared with this more general law the following results are obtained. Cer-

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<sup>o</sup> Societas enim est (quod etsi sæpe dictum est, dicendum tamen est semper) latissime quidem quæ pateat, omnium inter omnes ; interior eorum, qui ejusdem gentis sunt ; proprior eorum qui ejusdem civitatis. Itaque majores aliud jus gentium, aliud jus civile voluerunt : quod civile, non idem continuo gentium ; quod autem gentium, idem civile esse debet. (De offic. iii. 17.)



tain institutions and rules were common to the *jus gentium* and to the *jus civile* ; such are the institutions and rules applicable to the most ordinary contracts, such as the contracts of sale, letting to hire, partnership, &c. A much greater number of institutions appertained exclusively to the civil law ; such as marriage, which could only take place between Roman citizens, and was subjected to the most rigorous formalities ; the paternal authority which served as a basis to agnation ; and some of the peculiar modes, of acquiring a title to property such as manucaption, usucaption, &c. Still the greater part of these institutions of positive law, being founded upon the nature of man, must have found their place in systems of foreign law under some other form. So that we find that after Rome had extended her relations more widely with foreign nations, the Roman tribunals recognized in practice institutions of general law corresponding to the institutions of civil law. Thus they admitted a marriage according to the *jus gentium*, to be as valid as a civil marriage, although deprived of some of its legal effects. It follows from what has been stated that there was not a complete opposition between the municipal law and the *jus gentium*, for the greater part of the first is found recurring in the second. Besides, this partial opposition must have been constantly diminishing by the lapse of time ; since two systems of law, constantly in contact, and applied by the same judges, naturally tend to assimilate.

Thus is explained the identity of two expressions which the Roman jurisconsults employ as synonymous : *jus gentium*, that law which is found among all the known nations of the earth ; *jus naturale*, founded upon the general nature of mankind. Nevertheless of these two forms of the same idea, the first ought to be considered as predominant, since in the view of the Romans, the *jus gentium*, as well as the *jus civile*, was a positive law, the origin and developement of which must be sought for in history. In proportion as the Roman people assimilated to itself the conquered nations,

and lost its own individuality, the *jus gentium*, being more appropriate to the immense extent of the empire, must have increased in importance.<sup>p</sup> When the Romans had extended their dominion over all Italy and beyond the Alps, their national character lost something of its original peculiarity, and the national laws were modified by contact with the surrounding nations. The universal, natural law, *jus gentium*, supposed to prevail among these nations, and to be common to them and the Romans, was gradually introduced in practice as supplementary to the ancient national law, *jus civile*. Having originated from intercourse with foreigners, it was at first applied to them, and placed under the direction of a special prætor. The Roman governors subsequently applied it in the provinces. The modification sustained by the national character of the Romans through this intercourse reacted on their municipal law, which gradually approximated more and more to the universal law; in other words, the *jus civile* borrowed more and more from the *jus gentium*.<sup>q</sup>

Though the Romans had a very imperfect knowledge of international morality as a science, and too little regard for it as a practical rule of conduct between states, yet their national jurisprudence contributed to furnish the materials for constructing the new edifice of public law in modern Europe. The stern spirit of the Stoic philosophy was breathed into the Roman jurisprudence, and contributed to form the character of the most accomplished aristocracy the world ever saw. There is a calm and placid dignity in the pictures drawn by the classic writers of the private manners of the Roman patricians, strongly contrasting with the harsher features of their public conduct, but which blended

Influence of  
the Roman  
law in forming  
the modern  
law of nations.

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<sup>p</sup> Savigny, *System des heutigen Römischen Rechts*, B'd I. B. I. Kap. III. a. 22.

<sup>q</sup> Savigny, *Geschichte des Römischen Rechts in Mittelalter*, B'd I. ch. 1. a. 1

together to form a character admirably fitting them to perform the dignified office of administering justice.

*Romæ dulce diu fuit et solenne, reclusa  
Mane domo vigilare, clienti promere jura.*

Theirs was for a long time the exclusive prerogative of interpreting the laws either as jurisconsults or prætors. The usage insensibly grew up of certain families devoting their peculiar attention to the study and practice of jurisprudence, and transmitting the knowledge thus gained as a private inheritance and most valuable instrument of political power. These circumstances essentially contributed to the perfection of the science in a state, where every other liberal pursuit was for a long time thought unworthy of its ingenious citizens. So long indeed as the republic endured, eloquence might be considered as the first of the arts of peace ; but with the decline of freedom eloquence became corrupted, and with its primitive vigour lost its salutary influence. The civil law was the only walk of public life in which the genius of old Rome still survived. The heart of the Roman patriot there still recognized his country.<sup>r</sup> In performing the duty of interpreting the laws to their clients and fellow citizens, the patricians invented a sort of judicial legislation, which was improved from age to age by the long line of jurisconsults, following each other, in regular and unbroken succession, from the foundation of the republic to the fall of the empire. The consequence was that civil law, which seems never to have grown up to be a science in any of the Grecian republics, became one very early at Rome, and was thence diffused over the civilized world.<sup>s</sup> The mighty fame and fortune of the Roman people in this respect cannot be contemplated without emotion.

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<sup>r</sup> Artes honestas, et, sive ad rem militarem, sive ad juris scientiam, sive ad eloquentiam inclinasset. \* \* \* (Tacit. de Causis corrupt. Eloquentiæ, c. 28.)

<sup>s</sup> Smith's Wealth of Nations, b. 5, c. 1, pt. 3.

Its martial glory has long since departed, but the "Eternal City" still continues to rule the greatest part of the civilized and Christian world, through the powerful influence of her civil laws.

The acute research and unrivalled sagacity of the same learned writer above quoted have laboriously collected and happily combined the multiplied proofs, scattered in many a worm eaten volume, that the Roman law, so far from having been buried under the ruins of the Roman empire, survived throughout the middle age, and continued to form an integral portion of European legislation long before the pretended discovery of the Pandects of Justinian at Amalfi in the beginning of the twelfth century. The vanquished Roman provincials were neither extirpated, nor generally deprived of their personal freedom, nor was their entire property confiscated by the Gothic invaders, as we are commonly taught to believe. The conquered people were not only permitted to retain a large portion of their lands, and the personal laws by which they had been previously governed; but the municipal constitutions of the Roman cities were, in general, preserved; so that the study and practice of the Roman law, could never have been entirely abandoned, even in what has been called the midnight darkness of the middle age. It is a well known principle of modern international jurisprudence that the local law of the territory governs all persons and things within the territorial jurisdiction without distinction of origin or race. In the middle age it was otherwise: in the same country, in the same city, the Frank, the Burgundian, the Goth, the Lombard, and the Roman, lived each according to his respective national law, administered by magistrates of his own nation. In the cities especially, the Roman law was preserved, together with the judicial institutions and magistrates by whom it had been previously administered, whilst the clergy of whatever race followed that law.<sup>†</sup> The restora-

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<sup>†</sup> Savigny, *Geschichte des Römischen Rechts in Mittelalter*, 1 B'd. Kap. 3.

tion of the western empire under Charlemagne once more united the greater part of the nations of Europe by the ties of common laws, religion, and ecclesiastical institutions, by the general use of the Latin language in all public transactions, and the majesty of the imperial name. From that time the Roman law was no longer considered as the particular law of the Romans living under the dominion of the Gothic sovereigns who had established themselves in the former provinces of the empire. It became henceforth the common law of those continental countries which were formerly Roman provinces, and was gradually extended to those parts of Germany beyond the Danube and the Rhine where Rome had never been able to establish her dominion.<sup>u</sup> On the revival of the study of the civil law, which as we have already seen had become more and more merged in the *jus gentium*, it became identified with the *jus gentium* in the modern sense of that term as synonymous with international law. The professors of the famous school of Bologna were not only civilians, but were employed in public offices, and especially in diplomatic missions and as arbiters in the disputes between the different states of Italy. The Italian republics of the middle age sprung from the municipal constitutions of the Roman cities which had been preserved under the dominion of the Lombards, the Franks, the Greek emperors, and the Popes.<sup>v</sup> In the controversy between the Lombard cities and the emperor Frederick Barbarossa, the first claiming their independence and the latter insisting on his regalian rights, the civilians were often appealed to as arbiters between the contending parties. Frederick, as the legitimate successor of Augustus and Charlemagne, laid claim to the entire despotic authority of the Roman emperors over their subjects. The confederated cities of Lombardy pleaded long possession and the acquiescence of Barbarossa's predecessors

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<sup>u</sup> Savigny, B'd. iii. ch. 16.

<sup>v</sup> Savigny, B'd. iii. ch. 19.

as confirming their title to substantial independence. The diet of Romcaglia, held in 1158, determined that the regalian rights were exclusively vested in the emperor, except as to those cities which could show positive grants of exemption by imperial charters. This decision is supposed to have been influenced by the famous four doctors of Bologna, who have been accused of base servility and of betraying the liberties of Italy on this occasion. Be this as it may, the fact of their being consulted as judges and arbiters of sovereign rights shows the growing influence and authority of the civilians as the interpreters of the only science of universal jurisprudence then known.

From this period the cultivation of the science of the *jus gentium* was considered as the peculiar office of the civilians throughout Europe, even in those countries which had only partially adopted the Roman jurisprudence as the basis of their own municipal law. The authority of the Roman jurisconsults was constantly invoked in all international questions, and was not unfrequently misapplied as if their decisions constituted laws of universal obligation.\* The Roman law infused its spirit into the ecclesiastical code of the Romish church ; and it may be considered as a favorable circumstance for the revival of civilization in Europe, that the interests of the priesthood, in whom all the moral power of the age was concentrated, induced them to cherish a certain respect for the rules of justice. The spiritual monarchy of the Roman pontiffs was founded upon the want of some moral authority to temper the rude disorders of society during the middle age. The influence of the Papal authority, though sometimes abused, was then felt as a blessing to mankind : it rescued Europe from total barbarism ; it afforded the only asylum and shelter from feudal oppression. The compilation of the canon law under the patronage of Pope Gregory IX., contributed to diffuse a

Influence of the canon law and the writings of the casuists.

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\* Grotius, de J. B. ac. P. Proleg. a. 53—55.

Victoria and  
Soto.

knowledge of the rules of justice among the Catholic clergy ; whilst the art of casuistry, invented by them to aid in performing the duties of auricular confession, opened a wide field for speculation, and brought them to the confines of the true science of ethics. The universities of Spain and Italy produced, in the sixteenth century, a succession of laborers in this new field. Among these was Francis de Victoria, who flourished as a professor at the university of Salamanca about the middle of that century, and Dominic Soto, who was the pupil and successor of Victoria at the same seat of learning, (which Johnson said he loved for its noble decision upon the Spanish conquests in America,) and published in 1560, an elaborate treatise, "of Justice and Law," which he dedicated to the unfortunately celebrated Don Carlos. Both Victoria and Soto condemned, with honest boldness and independence, the cruel wars of avarice carried on by their countrymen in the new world, under the pretext of propagating what was called Christianity in that age. Soto was the arbiter, appointed by the emperor Charles V. to decide between Sepulveda, the advocate of the Spanish American colonists, and Las Casas, the champion of the unhappy natives, as to the lawfulness of enslaving the latter. The edict of reform of 1543 was founded upon his decision in their favor. It has been said, that Soto did not stop here, but condemned in the most unmeasured terms the African slave trade then beginning to be carried on by the Portuguese. But I do not understand that Soto reprobated slavery in general, or even the slave trade itself, so long as it was confined to that unfortunate portion of the inhabitants of Africa who had been doomed to servitude from time immemorial, or had been enslaved by conquest in war, a title universally regarded in that age as giving a legitimate right to property in human beings *jure gentium*, especially as to infidel barbarians ; but only that he condemned that system of kidnapping, by which the Portuguese traders seduced the natives to the coasts

under fraudulent pretences, and forced them by violence on board their slave ships.<sup>x</sup>

To the above names may be added that of Francisco Suarez, another casuist who flourished in the same century, and of whom Grotius says that he had hardly an equal, in point of acuteness, among philosophers and theologians. Some parts of his theory of private morals are justly reprobated by Pascal in his *Lettres Provinciales*; but this Spanish jesuit has the merit of having clearly conceived, and expressed, even at that early day, in his treatise *de legibus ac deo legislatore*, the distinction between what is commonly called the law of nature and the conventional rules of intercourse observed among nations. "He first saw," says Sir J. Mackintosh, "that international law was composed not only of the simple principles of justice applied to the intercourse between states, but of those usages long observed in that intercourse by the European race, which have since been more exactly distinguished as the consuetudinary law of the Christian nations of Europe and America."

Saurez.

The *Relectiones Theologicae* of Francis de Victoria is a book which has become remarkably scarce, although it passed through at least six editions, from the first edition published at Lyons in 1557, to the latest published at Venice in 1626. It consists of thirteen *relectiones*, as the author calls them, or dissertations on different subjects treated as questions of casuistry. Two of these, the fifth entitled *De Indis*, and the sixth *De Jure Belli*, relate to subjects of international law.

Francis de  
Victoria, *Re-  
lectiones The-  
ologicae*.

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<sup>x</sup> "If the report," says Soto, "which has lately prevailed, be true, that Portuguese traders entice the wretched natives of Africa to the coast by amusements and presents, and every species of seduction and fraud, and compel them to embark in their ships as slaves, neither those who have taken them, nor those who buy them from the takers, nor those who possess, can have safe consciences, until they manumit these slaves, however unable they may be to pay ransom." (Soto, de *Justitia et Jure*, lib. iv. *Quaest.* ii. art. 2.)

<sup>y</sup> Mackintosh, *Progress of Ethical Philosophy*, sect. 3, p. 51.



The fifth Relection enumerates the various titles by which the Spanish assumption of sovereignty over the new world and its inhabitants had been vindicated. The author asserts the natural right of the Indians to dominion over their own property and to sovereignty over their own country. He denies the assertion of Bartolus and the other civilians of the school of Bologna that "the emperor is lord of the whole world," or that the pope could confer dominion over those parts inhabited by infidel barbarians, on the kings of Spain. He rests their title on what he calls the right of natural society and intercourse as authorizing the Spaniards to sojourn and trade in those parts of the world without injuring the native inhabitants. The refusal of hospitality and permission to trade he holds to be a just ground of war, which again might lead to the acquisition of sovereignty through the right of conquest confirmed by voluntary cession. He denies the right of making war upon the infidel natives for refusing to receive the gospel, but asserts that they might be constrained to allow its being preached to those who wished to hear, and prevented from persecuting the new converts. At the same time he seems conscious that this license might be abused by his countrymen, and therefore strives to limit it by tempering their zeal with mercy, and prohibiting all violence which under the pretext of religion, might minister to their avarice and other worldly passions.

The sixth Relection treats exclusively of the laws of war, and examines the four following questions. 1. Whether Christians may lawfully engage in war? 2. In whom the authority of declaring and carrying on war resides? 3. What are causes of just war? 4. What may lawfully be done against an enemy in a just war?

Upon the first question, Victoria holds that Christians may lawfully engage in defensive war, repel force by force, and recapture their property taken by the enemy. They may even engage in offensive war, which he defines to be that in which compensation is sought for injuries re-

ceived. These propositions of natural law he supports by quotations from the sacred scriptures and the authority of the fathers of the church.

He answers the second question by stating that, since it is lawful to repel force by force, war merely defensive may be waged by the private authority of the party injured for the defence of his person or property. But there is this difference between a private person and the state, that the right of the former is confined to mere self defence, and does not extend to the redress of injuries, or even the recapture of things unjustly taken, after an interval of time has subsequently elapsed. The resort to force in self defence must be against a present danger, or as the civilians express it *in incontinenti*. The state, on the other hand, has not only the right of defending itself, but of seeking the redress of injuries done to itself or its subjects. The authority of making war for the latter purpose, therefore resides exclusively in the sovereign or state. But the question recurs what constitutes a state? The answer is, that it is a perfect community, that is, such as does not form a part of any other state, but which has its own laws, its own legislature, and its own magistrates; such, for example, as the kingdom of Castile and Aragon, the republic of Venice, and the like. There may even be several perfect communities or states under the dominion of the same prince, in whom alone is vested the right of declaring and carrying on war. But this right cannot lawfully be exercised by vassal principalities which form members of an imperial state.

The third question, he answers, in the first place, negatively, that diversity of religious faith is not a cause of just war, nor as against an infidel nation that they refuse to embrace Christianity. Nor the extension of dominion, nor the glory and private advantage of the prince, who ought in all things to rule with a sole view to the public interest of the state. The difference between a lawful king and a tyrant, consists in this that the former rules for the good of his people, the latter for his own private advantage. It is

to make slaves of citizens to compel them to bear the burthens of war, not for the public interest but for the mere private advantage of the prince. Injury received is the sole just cause of war. Natural law prohibits killing the innocent, and it is therefore unlawful to draw the sword against those who have done us no injury. Victoria omits the consideration of the question, whether God may not have otherwise ordained on some special occasions; for He is the lord of life and death, and may otherwise dispose in vindication of his own cause. Nor is every degree of injury sufficient to justify a resort to war. As in civil society every crime is not to be visited by the severest punishments, such as death, exile, and confiscation; so neither in the great society of nations is it allowable to visit slight injuries with the slaughter and devastation which war brings in its train.

To the fourth question, he answers, that it is lawful in war to do every thing which is necessary for the defence and preservation of the state. It is lawful to recapture things taken by the enemy, or to recover their value; to seize on so much of his property as may be necessary to defray the expenses of the war, and to compensate all damages unjustly sustained. In a just war, we may even go farther, and occupy the enemy's territory and his fortresses so as to punish him for injuries inflicted, and obtain peace and security against his hostile designs.

Such are the belligerent rights incident to a just war. But, the author inquires, in order to constitute a just war, is it sufficient that the belligerent believes it to be just? To which he answers, not in all cases. It must be referred to the judgment of wise men to determine whether the war be founded on a just cause. The greatest care and diligence ought to be used in this inquiry, and the reasons urged even by the adverse party ought to be well weighed. A war may be just on both sides, each party believing himself to be justified. Even the Turks and Saracens may be said to wage just war against Christians, since they believe

that they are thereby serving God. Subjects are not bound to serve their prince in a war manifestly unjust, since no temporal authority can justify us in slaying the innocent. At the same time, the duty of examining the question of the justice or injustice of the war devolves principally on the chief men of the nation, who ought to be consulted by the sovereign on such a momentous occasion. Those inferior members of the state who are not called to the public council, may lawfully abide by the decision of their superiors as to the justice of the war. In a doubtful case, the subjects are bound to obey the orders of their sovereign.

Returning again to the question, what acts of hostility are lawful, he inquires whether it is lawful to kill the innocent ? Which he answers in the negative, neither women nor children, who are presumed to be innocent even in war against the Turks. This presumption is also extended by the usage among Christians to husbandmen, and in general to all persons engaged in civil or religious life, and to strangers sojourning in an enemy's country. Still these persons among the enemy may lawfully be despoiled of their goods, such as ships, arms, and money, which are the sinews of war ; but if the war may otherwise be prosecuted successfully, the property of husbandmen and other innocent persons ought not to be destroyed or carried away. The property of both innocent and guilty is subject to reprisals, in case restitution is refused of things unjustly captured. Thus if French subjects make incursions into Spain, and plunder the inhabitants, and redress is refused by the king of France, the Spaniards may, by authority from their prince, despoil innocent French merchants or husbandmen. The letters of marque and reprisal which are granted in such cases are not unjust, since it is owing to the neglect and fault of the other prince that this license is granted to despoil his innocent subjects. But they are perilous, and give occasion to indiscriminate plunder.

As it is unlawful to kill children and other innocent persons, so neither is it lawful to carry them into captivity.

But in a war against Pagans, which may be said to be perpetual and without hope of obtaining satisfaction, doubtless the women and children of the Saracens taken prisoners may be detained as slaves. By the law of nations prevailing among Christians it is not lawful to make slaves of captives taken in war, but they may be detained until redeemed by the payment of a ransom, which is not to be extended beyond what the necessity of war and the usage of belligerents may require. Victoria then puts the question whether hostages for the observance of a truce, or other compact between enemies, may lawfully be put to death on the infraction of the compact? Which he answers by a distinction between hostages who have borne arms, and innocent persons such as women and children. The former may, the latter may not be put to death in the case supposed. As to the question whether all persons who take arms against us may lawfully be slain, he answers, that in the heat of battle, or in the attack and defence of a besieged place, whilst the conflict is still *in periculo*, all who continue to resist may be put to death. The only doubt is in the case where victory is already secured, and no danger is to be apprehended from the enemy, whether those who have taken up arms against us may lawfully be slain. This doubt he solves by quoting the command of Jehovah to the Jews in the 20th chapter of Deuteronomy, forgetting what he had before said as to such special precepts being applicable only to the particular occasion. Not altogether satisfied with this indiscriminate license to slaughter enemies no longer resisting, he limits it to the necessity of striking terror into the survivors and thus obtaining security against their hostile designs. He therefore concludes that it is not always lawful to slay all who have taken up arms. But this mitigation of the extreme rights of war is not applicable to infidels, with whom there can be no hope of obtaining just terms of peace. And he understands the precept in Deuteronomy as being directed against such. So that he at last comes to the conclusion

that, as between Christian enemies, those who no longer resist cannot lawfully be slain, especially as subjects are not bound to inquire minutely into the justice of the war, but may take up arms at the command of their prince, and therefore may be considered in this sense as innocent persons. And even though by the law of nature military persons who surrender, or are taken prisoners, might lawfully be slain, the usage and custom of war which had become a part of the law of nations, had ordained otherwise. But Victoria states that he had never heard that this usage and custom extended to the case of the garrison of a fortified place which surrendered at discretion. Where there is no capitulation, expressly securing the lives of the prisoners, they may lawfully be put to death.

As to the question whether things taken in a just-war become the property of the captors, he answers that, as the object of such a war is to obtain satisfaction for injuries done by the enemy, the things taken from him may be confiscated for that purpose. But it is necessary to distinguish among those things taken in war. These are either moveables, such as money, clothing, silver, and gold; or immoveables, such as lands, cities, and fortresses. As to moveables, they become by the law of nations the property of the captor even if they exceed in value the amount of the injury inflicted by the enemy. For this position he cites the *l. si quid in bello* and *l. hostes ff. de capti.* and *c. jus gentium* 1. and *Inst. de rer. divis. § itemque ab hostibus*, where it is expressly said “*quod jure gentium quæ ab hostibus capiuntur, statim nostra fiunt.*” He fortifies the authority of the Roman law in this respect by that of the sacred scriptures and the writings of the casuists. Admitting that a captured city may be given up to plunder, he restrains this concession to cases of dire necessity which can alone justify a resort to this cruel extremity. As to immoveables, he states that the enemy’s lands, cities, and fortresses may be occupied and held until adequate satisfaction is made for the injuries inflicted by him. But the

exercise of this right is not to be extended beyond what equity and humanity may justify in order to obtain indemnity for the past and security for the future. On the settlement of the terms of peace only so much of the enemy's territory can justly be retained as is necessary for these purposes. The right of conquest gives a just title, to this extent, to the acquisitions made in war, and finally confirmed by the treaty of peace. Contributions may also be levied on the enemy, and that, not only to the extent of an adequate indemnity, but by way of punishment proportioned to the offence. In extreme cases, where the amount of injury is very great, and no other security can be obtained for the faithful observance of the peace, the existing government of the conquered country may be subverted, and the sovereignty united to that of the conqueror. All these extreme rights of war are to be tempered in their exercise by the consideration that the justice or injustice of the war may be doubtful, and the enemy sovereign may act *bona fide* in carrying it on, after having carefully examined the question through the counsel of wise and good men.

Victoria concludes this dissertation by laying down three canons or rules of conscience relating to the subject. 1. That the sovereign, in whom is vested the right of making war, not only ought not to seek for occasions of hostility, but as far as in him lies, to live at peace with all men, according to the precept of St. Paul to the Romans ; all men being our neighbours, whom we are bound to love in the same degree as ourselves, and inasmuch as we have a common lord at whose tribunal we must render an account. Nothing therefore but the strongest necessity can justify a resort to arms in order to obtain the redress of injuries. 2. War being undertaken for a just cause, is to be prosecuted not to the utter destruction of the enemy, but in order to inflict upon him such an amount of evil as may be necessary for the defence of the state and obtaining a secure peace. 3. Victory being once obtained is to be used with moderation, and Christian modesty. The conqueror is

bound, in determining the amount of satisfaction due to his own nation, to consider himself as an impartial judge between the two belligerent states. He is the more bound to this rule of moderation inasmuch as wars among Christians are generally to be attributed to the misconduct of rulers. Subjects take up arms for their prince confiding in the justice of his cause, and most unjustly suffer for the faults of their superiors. As says the poet :

*Quicquid delirant Reges, plectuntur Achivi.*

Besides the works connected with theological casuistry, a number of practical treatises were also published about this period by Spanish and Italian writers, several of whom are cited by Grotius.<sup>a</sup> Spain, under Charles V. and Philip II., having become the first military and political power in Europe, maintaining large armies and carrying on long wars, was likely to be the first nation that felt the want of that more practical part of the law of nations which reduces war to some regularity. Among the earliest of these is a treatise by Balthazar Ayala, judge advocate to the Spanish army in the Netherlands, under the Prince of Parma, to whom it is addressed in a dedicatory epistle from the camp before Tournay in 1581. This work is divided into three books, the second of which relates exclusively to military policy, and the third to martial law. In the first, the author treats of the laws of war as a branch of the law of nations, with a continual reference to examples drawn from Roman law and Roman history.<sup>b</sup>

The first chapter expounds the received forms of declaring war, and other belligerent ceremonies, which the author deduces from the Roman fecial law, and without the observance of which no war was deemed just by that people. The second chapter treats of the just causes of war. Ayala

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<sup>a</sup> De J. B. ac. P. Proleg. 37, 38.

<sup>b</sup> Balthazaris Ayalaë, J. C. et Exercitus regii apud Belgas supremi Juridici, de jure et officiis bellicis, libri iii. Antverpiæ, 1597, 12 pp. 405.



concurs with Victoria in attributing the authority of declaring and carrying on war to the supreme power of the state. War is just when undertaken for the defence of the state, its subjects, its property, its allies, and for the recovery of persons or things unjustly taken by the enemy. Neither rebels nor pirates are considered as public enemies; they are not entitled to the rights of war in respect to captures and postliminy; property in things taken by them is not lost to the original owners. But things taken from them become the property of the captors as if taken from a public enemy. War against infidels, on the mere ground of their religion, is not to be justified; for their infidelity does not forfeit the rights of sovereignty and dominion secured to them by the law of nations; nor was that dominion over the earth given originally to the faithful alone, but to every rational creature. Nor can such a war be sanctioned by the authority of the emperor or pope. Not by the authority of the emperor, for he is not "the lord of the world;" nor by that of the pope, for he has neither temporal nor spiritual dominion over infidels, and it does not belong to the church to punish infidels who have never received the Christian faith. But if they have once received it, and afterwards endeavor to prevent the propagation of the gospel, they may justly be coerced by war like other heretics. In all these cases the subject is bound to submit his judgment to that of the sovereign, who alone is responsible for the justice or injustice of the war. A war may be just in a legal sense, even when not founded on a just cause, since there is no sovereign arbiter between states. That war may be called just which is declared and carried on by the lawful war-making power. Thus Ulpian says: "*Hostes sunt quibus publice populus Romanus bellum decrevit, vel ipsi populo Romano: ceteri vero latrunculi vel prædones appellantur.*" A war thus declared entitles both belligerent parties to all the rights of war.

The third chapter contains a digression upon duels or private combats, which the author condemns as a violation

of all laws, human and divine. The fourth treats of reprisals against the property of the offending nation, which can only be granted by the supreme authority of the state in which the war-making power is vested.

The fifth chapter treats of things taken in war and of the *jus postliminii*. ¶(Things taken from the enemy in a just war become the property of the captors.) But a distinction is to be made between moveables and immoveables, such as lands and houses, which last are confiscated to the use of the state. And by the laws of Spain, not only lands and houses, but ships of war taken from the enemy become the property of the crown. Even as to other moveables, the right of the captors to appropriate them as booty is restrained by that of the state to regulate the division, reserving to itself a certain share, and distributing the rest according to the respective rank of the captors. Ayala cites the texts of the Roman law, showing that not only things, but persons taken in war, become the property of the captors, and that slavery which did not exist by the law of nature was thus introduced through the law of nations. Among Christian nations, however, an ancient and laudable custom had substituted the practice of ransoming prisoners of war for that of making them slaves. The more ancient usage of reducing prisoners of war to servitude still subsisted at the time when he wrote as between Christian and infidel nations such as the Turks and Saracens. Persons reduced to slavery in this manner recover their liberty on their return to their own country *jure postliminii*. The original owner is likewise entitled to the restitution of lands and other immoveable property from which the enemy is expelled. The same legal fiction is also applicable to the case of ships and other moveables recaptured from the enemy. As to these last, our author adopts the distinction of Labeo, "*Si quid bello captum est, in præda est, nec postliminio redit.*" Such moveables as are recaptured before they have been carried *intra præsidia hostium* are consequently to be restored to the original proprietor, because

they have not yet been appropriated as booty. Things recaptured from pirates are to be restored, whether they have been carried *intra præsidia* or not, because a capture by them is wholly void.

The sixth chapter relates to the duty of keeping faith with enemies. This duty is enforced, as usual, by examples taken from Roman history and the precepts of Roman philosophers, such as Cicero, Seneca, and others, who taught that the performance of contracts made with an enemy was not to be eluded under the pretext of duress or by subtle interpretation of the words in order to defeat the real intention of the parties. Such was the quibble of Q. Fabius Labeo, by whom Antiochus, having been defeated, had stipulated to deliver up half his fleet, which treaty the Roman general executed by sawing each galley in halves, and thus depriving the king of his whole navy. So also the Romans destroyed Carthage, which they had stipulated to preserve, alleging that the promise was to spare the citizens, not the city.<sup>c</sup> Our author also mentions the case of the ten Romans captured by Hannibal at the battle of Cannæ, and sent to Rome to negotiate an exchange of prisoners, under a promise confirmed by oath to return if they failed in effecting that object, one of whom sought to elude his engagement by going back to the Carthaginian camp under pretext of having forgotten something, and then pursued his way to Rome. According to Polybius, the senate ordered him to be bound and delivered up to Hannibal. For, as Cicero justly observes, "fraud does not absolve, but only aggravates perjury."<sup>d</sup>

What has been said refers only to public enemies engaged in lawful war, and not to pirates and robbers, with

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\* \* \* \* Per *Carthaginem*, quam libera fore promiserant Romani, *Carthaginienses* intelligi, non urbem et solum.

<sup>d</sup> Reditum enim in castra, liberatum se esse jure jurando interpretabatur: non recte. Fraus enim adstringit, non dissolvit perjuriam. Fuit igitur stulta calliditas, perversæ imitatur prudentiam. (Cic. de Offic. III. 32).

whom there can be neither faith nor compact. This brings him to consider the nicer case of compacts with rebels, which, as might naturally be expected from a Spanish civilian writing in the camp of the Prince of Parma in the Netherlands, he decides to be absolutely void, as well as those made with tyrants ; by which term he means usurpers, since he had before enforced the duty of passive obedience to lawful princes however cruel and oppressive their conduct. Promises extorted by tyrants are not binding, since they lack the essential ingredient of free consent. The same may be said of those compacts which a people in rebellion unjustly extort from their prince. Nor is faith to be kept with public enemies in all cases, that is to say in those cases referred to by Cicero where the circumstances have so changed that the performance of the promise would be injurious to the party to whom it is made ; or where it is contrary to the divine law ; or where made by an unauthorized individual to the prejudice of the state ; or where the enemy himself is guilty of a breach of faith. It is not lawful to avenge perfidy by perfidy ; but a convention, whether of alliance, peace, or truce, which is infected by fraud is void *ab initio*.

The seventh chapter relates to treaties and conventions. These were stated by the Roman ambassadors to Antiochus\* to be of three kinds. 1. Where the victorious party dictates laws to the conquered people, of which there are so many examples in the Roman history. 2. Treaties of peace and friendship founded on the basis of equal reciprocity, such as that concluded between the Romans and Sabines. 3. Treaties of friendship and alliance between nations who had never been engaged in war with each other. This class may again be divided into treaties of defensive alliance, and those which are both offensive and defensive. To these may also be added treaties of commerce. Our author here explains the difference between a *fœdus* and a

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\* Liv. Hist. lib. 44.

*sponsio* according to the Roman law. The commander of an army has power to make a temporary truce, but not a perpetual peace without special authority from his sovereign.

The eighth chapter treats of stratagems and frauds in war. It is allowable to attack an enemy by force or fraud, and any kind of deceit or stratagem may be practised against him, provided good faith is observed in respect to the performance of promises. The Greeks and Carthaginians boasted of their skill in deceiving the enemy, but the Romans in the earlier days of the republic magnanimously disdained such acts. If they subsequently adopted them, it was not without strong opposition on the part of those senators who appealed to the better example of their ancestors.

The ninth chapter concerns the rights of legation. Our author asserts that the character of ambassadors had ever been considered sacred and inviolable among all nations, and quotes several examples where the judgment of the feacial college determined the Romans to deliver up to the enemy those who had violated the *jus gentium* in this respect. He refers to the conduct of the dictator Posthumius, who carried his scruples so far as to liberate certain Volscians, who had been clothed with the office of *legati* in order to mask their real character of spies who came to examine the Roman camp. But Ayala doubts whether the immunity of ambassadors extends to a case where they act in a manner so inconsistent with their official character.<sup>f</sup>

The rights of legation belong only to public enemies, not to pirates, robbers, and rebels. Traitors who take refuge in the enemy's country cannot protect themselves by assuming the character of ambassadors. Our author applies this to the famous case of the ambassadors of Francis I,

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<sup>f</sup> Quod tamen exemplo non putarem legatos violatos, contra jus gentium omnino jure tutos esse, cum legati nihil extra legationis munus agere possint. (Lib. i. cap. ix. § 2.)

native subjects of Charles V, who were assassinated on their way through the Milanese to Venice and Turkey, and whose murderers the emperor refused to deliver up.

Conrad Brunus, author of an elaborate treatise *De Legationibus*, published at Mainz in 1548, is no where mentioned by Grotius.<sup>s</sup> The author was a German civilian and Catholic. The principles he lays down are buried under a load of quotations from the writers on the Roman law, the canonists, the sacred scriptures, the fathers of the church, the ancient poets, philosophers, and historians. But he distinguishes accurately between the full power, the letters of credence, and the instructions of a public minister.<sup>h</sup> He deduces the modern institution of embassies from the Roman feacial law, which required a solemn declaration of war with certain prescribed formalities to authorize acts of hostility. These formalities, he says, are no longer required in the intercourse of modern states, every thing relating to peace and war being negotiated by public ministers representing their respective sovereigns. Just war is that undertaken from the necessity of self defence, and for the public security. War may not lawfully be undertaken for the sake of acquiring fame and extending dominion, although, as Cicero says, military ambition is the infirmity of noble minds whose genius unhappily receives that direction.<sup>i</sup> Even in a just cause, war cannot lawfully be commenced without first demanding satisfaction for the injury received, except in cases where irreparable damage might be sustained by delay. In such cases, force may

Conrad Brunus.

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<sup>s</sup> This work contains 242 pages fol: divided into five books, of which the titles are as follows:

1. De Personis qui Legationes mittunt.
2. De personis eorum qui mittuntur.
3. De Legatorum officiis.
4. De Privilegiis, Immunitatibus, et Salaris Legatorum.
5. De Personis eorum ad quos Legati mittuntur.

<sup>h</sup> Lib i. cap. xi.

<sup>i</sup> Cic de Offic i. 22.

instantly be repelled by force, and the aggressor pursued into his own territory until the property taken is restored. For the right of self defence may be resorted to, not only to repel injuries, but to recover by arms what has been unjustly taken from us. Any war waged by Christians against the enemies of the Christian faith is just, as being undertaken for the defence of religion and the glory of God in order to recover the possession of dominions unjustly held by infidels, and thus highly useful to the entire Christian commonwealth. He refers to a separate treatise *De Seditiosis*, for his opinion respecting the justice of wars against heretics and schismatics. The war-making power resides in the supreme authority of the state, to whom it exclusively belongs to authorize hostilities against other nations by a solemn declaration.<sup>k</sup>

Brunus asserts that the law of nations in respect to the sacred character of ambassadors had been often violated in his time. Their immunity from civil suits and criminal prosecutions in the local courts of justice, as well as their exemption from taxes and duties, admitted in his opinion of no doubt.<sup>l</sup>

Albericus  
Gentilis.

Alberico Gentili, or as his name was latinized after the fashion of the age, *Albericus Gentilis*, was born in the March of Ancona, about the middle of the sixteenth century, of an ancient and illustrious family. His father, being one of the few Italians who openly embraced the doctrines of the reformation, was compelled to fly with his family into Germany, whence he sent his son Alberico to England, where he found, not only freedom of conscience, but patronage and favor, and was elected to fill the chair of jurisprudence at the university of Oxford. He did not confine his attention to the Roman law, the only system then thought worthy of being taught in a scientific manner, but

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<sup>k</sup> Lib. iii. cap. 8.

<sup>l</sup> Lib. iv. cap. 5.

investigated the principles of natural jurisprudence, and of the consuetudinary law governing the intercourse of Christian nations. His attention was especially directed to this last by the circumstance of his being retained as the advocate of Spanish claimants in the English prize courts. The fruits of his professional labors were given to the world in the earliest reports of judicial decisions on maritime law published in any part of Europe.<sup>m</sup> His more scholastic and academical studies produced one of the earliest regular treatises upon the laws of war *De Jure Belli* published in 1599, and dedicated to the Earl of Essex, who had procured for him the professorship of civil law at Oxford. Grotius acknowledges his obligations to Gentili, and Mr. Hallam remarks "that this comparatively obscure writer was of some use to the eminent founder, as he has been deemed, of international jurisprudence, were it only for mapping his subject, will be evident from the titles of his chapters, which run almost parallel to those of the first and third books of Grotius."<sup>n</sup> His title to be considered as the father of the modern science of public law is asserted by his countryman Lampredi, himself no incompetent judge of this branch of learning. "He first explained the rules of war and peace, which probably suggested to Grotius the idea of writing his own work: worthy to be remembered among other things for having contributed to augment the glory of his native Italy, whence he drew his knowledge of the Roman law, and proved her to be the earliest teacher of natural jurisprudence, as she had been the restorer and patroness of all liberal arts and learning."

Gentili also published, in 1583, a treatise on embassies, *De Legationibus*, which he dedicated to his friend and patron, the gallant and accomplished Sir Philip Sydney. The first book of this work contains an historical deduction

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<sup>m</sup> De Advocacione Hispanica, Hanov. 1613.

<sup>n</sup> Hallam's Introd. to the Literature of Europe, vol. ii. p. 154.



as to the origin of the different kinds of embassies, and the ceremonies anciently connected with them by the Roman feacial law. The second book treats more specially of the rights and immunities of public ministers. He examines the question, whether they are entitled to a privileged character in respect to any other power than that to which they may be accredited. In strict law, he concludes they are not; but it ought to be considered that ambassadors are the ministers of peace, representing the person of their sovereign, charged with the business of the state, and universally considered even by enemies as possessing a sacred and inviolable character. They ought not, therefore, to be denied a free passage, much less obstructed by violence on their way through the territory of a state other than that to which they are accredited.<sup>o</sup> The rights of legation do not extend to pirates and rebels. Such criminal associations of men do not constitute a state. They are not public enemies.<sup>p</sup> The case of a civil war is more doubtful. Here both parties claim to be the state, and each treats its adversary as guilty of treasonable resistance. The question must depend upon the respective factions being so evenly balanced as to make it for the interest of each to treat the other as if entitled to all the rights of public war.<sup>q</sup> Whatever may be the effect of civil dissensions, difference of religion at least cannot be held to deprive the respective parties of the rights of legation. They may affect to treat each other as heretics and schismatics, but they are not therefore absolved from the obligations of public law.<sup>r</sup> The immunity of the ambassador from the local jurisdiction of the country where he resides extends to the persons

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<sup>o</sup> Lib. ii. cap. 3.

<sup>p</sup> Lib. ii. cap. 7, 8.

<sup>q</sup> Lib. ii. cap. 9.

<sup>r</sup> Lib. ii. cap. 11.

of his suite, to his property, and to his dwelling.\* But Gentili very inconsistently holds that the ambassador is subject to the ordinary jurisdiction of the civil tribunals of the place where he resides in respect to contracts made during the continuance of the embassy.<sup>†</sup> This anomalous opinion is not confirmed by any other public jurist, and appears to be founded upon a misapplication of the Roman law in respect to the *legatus*, representing his province or city at the capital of the empire, or the *legatus* sent from Rome into the provinces on a special mission, who of course would be amenable as a subject to the local tribunals of the place where he temporarily resided, and where the contract was made. Yet he not very consistently maintains that a foreign ambassador cannot be punished by the tribunals of the state where he resides for a crime committed by him, but even in the case of a conspiracy against the government must be sent out of the country.<sup>‡</sup>

The third book relates almost exclusively to the qualifications required in a good ambassador, which according to our author are almost as numerous as those required by Cicero to form his perfect orator. Besides the gifts of natural genius and peculiar aptitudes for this vocation, Gentili requires eloquence, an extensive knowledge of history and political philosophy, dignity of manners and high courtly breeding, temperance, fortitude, prudence, and a sacred regard to truth and rectitude, in short, all those attainments, qualities and virtues which, according to him, were found united in his illustrious friend and patron Sir Philip Sydney.

In this part of his work, Gentili defends the moral tendency of Machiavelli's *Prince*, commonly supposed to have been intended as a manual of tyranny, but which he insists

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\* Lib. ii. cap. 15. \* \* \* Ne bona legatorum capi, ne sedes ipsorum intrari, bona ergo pro ore alieno capiendi, possint.

† Lib. ii. cap. 16, 17.

‡ Lib. II. cap. 18.

is a disguised satire upon the vices of princes, and a full and calm exposition of the arts of tyrants, written for the admonition and instruction of the people, by a man always actually engaged on the popular side in the factions of his own country, and almost a fanatical admirer of the ancient republicans and regicides.<sup>v</sup> Whatever may be thought of this long disputed question as to Machiavelli's motives in writing, his work certainly presents to us a gloomy picture of the state of public law and European society in the sixteenth century : one dark mass of dissimulation, crime, and corruption which called loudly for a great teacher and reformer to arise, who should speak the unambiguous language of truth and justice to princes and people, and stay the ravages of this moral pestilence.

Grotius.

Such a teacher and reformer was Hugo Grotius, who was born in the latter part of the same century and flourished in the beginning of the seventeenth. That age, peculiarly fruitful in great men, produced no one more remarkable for genius and for variety of knowledge, or for the important influence his labors exercised upon the subsequent opinions and conduct of mankind. Almost equally distinguished as a scholar and man of business, he was at the same time an eloquent advocate, a scientific lawyer, classical historian, patriotic statesman, and learned theologian. His was one of those powerful minds which have paid their tribute to the truth of Christianity. His great abilities were devoted to the service of his country and of mankind. He vindicated the freedom of the seas, as the common property of all nations, against the extravagant pretensions of Portugal, in respect to the navigation and commerce of the East Indies then first opened to the enterprize of the Dutch. His ungrateful country rewarded his virtues and services with exile, and would have extended her injustice to perpetual imprisonment or

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<sup>v</sup> Lib. III. cap. 9.

death, but for the courageous contrivance and self-devotion of his wife. Involved in the persecution of the Pensionary Barnevelt and the other Arminians, he was shut up in the fortress of Louvestein in the year 1619. He was, however, allowed the use of his books and the society of his heroic wife, who contrived to deceive his guards, and induce them to carry him out in a chest, while she remained thus voluntarily exposed to the vengeance of his enemies. Grotius escaped into France, and in his banishment returned good for evil by rendering the most important services to his countrymen. In an age peculiarly infected with party animosity, Grotius preserved himself pure from the taint of bigotry; and though actively engaged in the contentions between the religious factions of the Gomarists and Arminians, his expansive toleration embraced every sect, whether Protestant or Catholic; a degree of liberality almost unexampled in those times. When he could no longer be useful in active life, he labored to win men to the love of peace and justice by the publication of his great work, which made a deep impression upon all the liberal minded princes and statesmen of that day, and contributed essentially to influence their public conduct. Alexander carried the Iliad of Homer in a golden casket to inflame his love of military glory; whilst Gustavus Adolphus slept with the treatise of Grotius on the Laws of War and Peace under his pillow in that war which he waged in Germany for the liberties of Protestant Europe. It is difficult to decide which presents the most striking contrast—the poet of Greece and the philosopher of Holland, or the two heroes who imbibed such opposite sentiments from their pages.\*

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\* The treatise *de Jure Belli ac Pacis* was composed during the author's exile in France and published at Paris in 1625. The *Mare Liberum* of Grotius appeared in 1634, and was answered in 1635 by Selden in his *Mare Clausum* in which the claim of England to the exclusive sovereignty over the seas which surround the British islands was maintained by that learned writer.

The motive assigned by Grotius for undertaking the composition of his great work is the noblest that could prompt a Christian jurist. "I saw," said he, "throughout the Christian world a license of warring at which even Barbarians might blush; wars commenced on trifling pretexts, or none at all, and prosecuted without reverence for any law, human or divine, as if that one delaration of war let loose every crime." The sight of such a monstrous state of things had induced some, like Erasmus, to deny the lawfulness of war to a Christian whose bounden duty it is to love all men. But the assertion of this impracticable doctrine leads to the pernicious consequence of begetting a prejudice against the temperate remedy which Grotius proposes to indicate for diminishing the evils of war. "Let therefore," he says, "the laws be silent in the midst of arms; but those laws only which belong to peace, the laws of civil life and courts of justice, not such as are eternal and fitted for all seasons, such as nature dictates and the consent of nations establishes as applicable according to the ancient Roman formula to a pure and holy war—*puro pioque duello*."<sup>\*</sup>

The necessity of such a work he deduces from the fact that a complete treatise of the laws of peace and war had never before been undertaken, and even those writers who had handled separate parts of the subject had left much to be gleaned after them in this rich field of science. No philosophical treatise on this subject by any ancient writer such as the work of Aristotle *δικαιώματα πόλεως* was still extant; and the Romans had bequeathed to us the title only of their books on the fecial law. The casuists in treating of cases of conscience had incidentally touched on questions relating to war, promises, oaths, and reprisals. He praises especially the writings of the Spanish casuists Covarruvias and Vasquez, who were equally versed in the civil and canon

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<sup>\*</sup> De J. B. ac P. Proleg. ss. 26, 28, 29.

laws, and had occasionally treated of international controversies; the former with great freedom, the latter more modestly, but with sound judgment. But these writers who had especially treated certain parts of the laws of war were either theologians, such as Francis de Victoria, Henry of Gorcum, William Matthæus; or doctors of the civil law such as Lupus, Arius, John de Lignano, and Martinus Laudensis. None of these had exhausted the subjects embraced by their works, and the greater part had handled them in a very immethodical manner, blending together in inextricable confusion the conclusions of natural, civil, canonical, and international law. Grotius acknowledges his obligations to Balthazar Ayala and Albericus Gentilis as diligent collectors of precedents; but he leaves to others to discover their deficiencies in point of method, style, and want of acuteness in distinguishing different classes of questions and the laws applicable to each. "Albericus Gentilis," he says, "is wont in determining controverted questions, either to follow a few precedents not well vouched, or even the authority of modern lawyers in their opinions on particular cases, many of which are drawn up more with a regard to what the consulting parties desire than to what real justice and equity demand. But Ayala has not touched the grounds of justice and injustice in war: whilst Gentilis has treated some of them, according to his views, in a summary manner: but the greater part of these topics, and those of the most importance, and of the most frequent occurrence have been entirely omitted by both."<sup>2</sup>

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<sup>1</sup> Mr. Hallam observes on this passage that "Grotius is surely mistaken in saying that Ayala has not touched on the grounds of justice and injustice in war. His second chapter is on this subject in thirty-four pages, and though he neither sifts the matter so exactly, nor limits the right of hostility so much as Grotius, he deserves the praise of laying down the general principle without subtilty or chicanery." *Introduction to the Literature of Europe*, vol. ii. p. 153.

<sup>2</sup> De J. B. ac P. Proleg §§ 36, 37, 38.

Grotius has been ably defended against his modern detractors by Sir James Mackintosh in the following passage which we extract from his admirable discourse on the study of the law of nature and nations.

"Few works were more celebrated than that of Grotius in his own days, and in the age which succeeded. It has, however, been the fashion of the last half century to depreciate his work as a shapeless compilation, in which reason lies buried under a mass of authorities and quotations. This fashion originated among French wits and declaimers, and it has been, I know not for what reason, adopted, though with far greater moderation and decency, by some respectable writers among ourselves. As to those who first used this language, the most candid supposition we can make with respect to them is, that they never read the work; for, if they had not been deterred from the perusal of it by such a formidable display of Greek characters, they must soon have discovered that Grotius never quotes on any subject till he has first appealed to some principles, and often, in my humble opinion, though not always, to the soundest and most rational principles.

"But another sort of answer is due to some of those<sup>a</sup> who have criticised Grotius, and that answer might be given in the words of Grotius himself.<sup>b</sup> He was not of such a stupid and servile cast of mind, as to quote the opinions of poets or orators, of historians and philosophers, as those of judges, from whose decision there was no appeal. He quotes them as he tells us himself, as witnesses whose conspiring testimony, mightily strengthened and confirmed

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<sup>a</sup> Paley, in remarking upon the profusion of classical quotations made by Grotius, says: "To any thing more than ornament they can make no claim. To propose them as serious arguments, gravely to attempt to establish or fortify a moral duty by the testimony of a Greek or Roman poet, is to trifle with the reader, or rather take off his attention from all just principles in morals. (*Principles of Mor. & Polit. Philosophy*, Pref. pp. xiv, xv.)

<sup>b</sup> *De J. B. ac P. Proleg.* § 40.

by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty and the fundamental principles of morals. On such matters, poets and orators are the most unexceptionable of all witnesses; for they address themselves to the general feelings and sympathies of mankind; they are neither warped by system, nor perverted by sophistry; they can attain none of their objects, they can neither please nor persuade, if they dwell on moral sentiments not in union with those of their readers. No system of moral philosophy can surely disregard the general feelings of human nature and the according judgment of all ages and nations. But where are these feelings and that judgment recorded and preserved? In those very writings which Grotius is gravely blamed for having quoted. The usages and laws of nations, the events of history, the opinions of philosophers, the sentiments of orators and poets, as well as the observation of common life, are, in truth, the materials out of which the science of morality is formed; and those who neglect them are justly chargeable with a vain attempt to philosophize without regard to fact and experience, the sole foundation of all true philosophy.

"If this were merely an objection of taste, I should be willing to allow that Grotius has indeed poured forth his learning with a profusion that sometimes rather encumbers than adorns his work, and which is not always necessary to the illustration of his subject. Yet even in making that concession, I should rather yield to the taste of others than speak from my own feelings. I own that such richness and splendor of literature have a powerful charm for me. They fill my mind with an endless variety of delightful recollections and associations. They relieve the understanding in its progress through a vast science, by calling up the memory of great men and of interesting events. By this means we see the truths of morality clothed with all the eloquence (not that could be produced by the powers of one man, but) that could be bestowed on them by the



collective genius of the world. Even virtue and wisdom themselves acquire new majesty in my eyes, when I thus see all the great masters of thinking and writing called together, as it were, from all times and countries, to do them homage and to appear in their train.

“But this is no place for the discussions of taste, and I am very ready to own that mine may be corrupted. The work of Grotius is liable to a more serious objection, though I do not recollect that it has ever been made. His method is inconvenient and unscientific. He has inverted the natural order. That natural order undoubtedly dictates, that we should first seek for the original principles of the science in human nature ; then apply them to the regulation of the conduct of individuals, and lastly, employ them for the decision of those difficult and complicated questions that arise with respect to the intercourse of nations. But Grotius has chosen the reverse of this method. He begins with the consideration of the states of peace and war, and he examines original principles only occasionally and incidentally as they grow out of the questions which he is called upon to decide. It is a necessary consequence of this disorderly method, which exhibits the elements of the science in the form of scattered digressions, and that he seldom employs sufficient discussion on these fundamental truths, and never in the place where such a discussion would be most instructive to the reader.”<sup>c</sup>

Consolato del  
Mare.

Maritime war, during the middle age, was identified with piracy by the cruel and barbarous manner, in which it was carried on, without discrimination of friend or foe. The first attempt to give laws to the practice of warfare at sea may be traced in that curious and venerable monument of jurisprudence the *Consolato del Mare*. The learned researches of M. Pardessus have satisfactorily referred the compilation of this collection of maritime precedents, in

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<sup>c</sup> Mackintosh's Discourse, &c. pp. 22, 27, Ed. 1828.

point of time to the latter part of the fourteenth century, and of locality to the flourishing city of Barcelona, where that dialect of the Roman tongue, in which the *Consolato* was originally written, was then, and still is the spoken language of the province of Catalonia.<sup>4</sup> This compilation ought not, according to this writer, to be considered as a code of maritime laws promulgated by the legislative authority of one or of several nations, but as a record of the customs and usages received as law by the various commercial communities bordering on the Mediterranean sea. Whoever were the authors of the *Consolato*, whether it is to be attributed to public or private authority, its compilation must doubtless be referred to the same causes which produced the publication of that collection of the maritime customs and usages of the nations bordering on the western seas, called the *Jugemens* or *Rôles d'Oléron*. It may even be said that circumstances were more favorable to the compilers of the *Consolato*, since Barcelona, Marseilles, Valencia, and other commercial cities of the *Langue d'Oc* already possessed in the fourteenth century a great body of maritime jurisprudence under the name of statutes or customs. These written codes contained, besides a great number of local ordinances embracing regulations of positive institution, many general rules and principles which time had gradually consecrated in the practice of Mediterranean commerce. These statutes were generally written in Latin, a language which though still familiar to jurists and other learned men, had already become a dead language to the great mass of society, and consequently to the active and industrious class of merchants and navigators. This class was therefore deeply interested in possessing a concise manual of maritime jurisprudence like the *Consolato*, written in the vulgar tongue and in a style of the most per-

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<sup>4</sup> Pardessus, Collection des Loix Maritimes antérieures aux XVIII Siècle, tom. II, chap. XII.

fect simplicity. Still its author or authors were evidently men of extensive learning, deeply versed in the principles of the Roman law, the *Basilics* and the legislation of those cities of France, Spain, and Italy, which carried on trade with the Levant. These qualities soon acquired for this collection a wide spread reputation, whilst the general wisdom and equity of its decisions caused it to be adopted by all the maritime states bordering on the Mediterranean sea as supplementary to their own local laws and usages. Its value in these respects has been ever since acknowledged by all the maritime nations of Christendom. This ancient collection has been considered by all these nations as of great authority embodying the collected wisdom and experience of the most renowned commercial states of the middle age. By some it has been adopted as an authoritative system of jurisprudence, by others its principles have been incorporated into their written ordinances. The compilers of the marine ordinance of Louis XIV. resorted to this, among other sources, for the materials from which that celebrated maritime code was constructed.\*

The Consolato del Mare embraces not only the elementary rules for the decision of controversies growing out of civil contracts relating to trade and navigation in time of peace, but what is more to our present purpose it expounds the leading principles then recognized as to belligerent and neutral rights in the following terms :—

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\* Emerigon, in his *Traité d'Assurance*, speaking of Hubner's criticism on the Consolato (*De la saisie des Batimens neutres, Discours Prelim. p. xi.*) says : " Cet auteur ayant trouvé dans le chapitre 273, des décisions contraires à son système, a été de mauvaise humeur contre l'ouvrage entier ; mais s'il eut examiné avec soin, il se seroit convaincu, que les décisions que le Consolato renferme, sont fondées sur le droit des gens. Voilà pourquoi elles réunirent les suffrages des nations ; elles ont fourni une ample matière aux rédacteurs de l'Ordonnance de 1681 ; et malgré l'écorce Gothique qui les enveloppe quelques fois, on y admire l'esprit de justice et d'équité qui les a dictées."

**" Chapter CCLXXIII. [273.]**

**" Of the ship laden with goods taken by an armed vessel.**

**" If an armed ship or cruiser, meets with a merchant vessel, belonging to an enemy and carrying a cargo, the property of an enemy, common sense will sufficiently point out what is to be done : it is, therefore, unnecessary to lay down any rules for such a case.**

**" If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of recapture ; paying to the vessel the whole freight which she would have earned at her delivering port ; and this freight shall be ascertained by the ship's papers ; or, in default of necessary documents, the oath of the master shall be received as to the amount of the freight.**

**" Moreover if the captor is in a place of safety where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, the neutral vessel is bound to carry it thither : but for this service there ought to be a compensation agreed upon between them, or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, or even more ; and this to be understood of a ship that has arrived in a place where the captor may secure his prize ; that is to say in the port of a friend ; and going on an ulterior voyage to that port to which the captor wishes her to carry the cargo which he has taken.**

**" If it shall happen that the master of the captured vessel or any of the crew, shall claim any part of the cargo as their own, they ought not to be believed on their simple word, but the ship's papers or invoice shall be inspected ; and, in defect of such papers, the master and his mariners shall be put to their oaths ; and if, on their oaths, they claim the property as their own, the captor shall restore it to**

them ; regard being paid at the same time to the credit of those who swear and make the claim.

“ If the master of the captured vessel shall refuse to carry the cargo, being enemy's property, to some such place of safety at the command of the captor, the captor may sink the vessel if he thinks fit, without control from any power or authority whatever ; taking care to preserve the lives of those who are in her. This must be understood, however, of a case where the whole cargo, or, at least, the greater part of it, is enemy's property.

“ If the ship should belong to the enemy, the cargo being either in the whole or in part, neutral property, some reasonable agreement should be entered into on account of the ship, now becoming lawful prize, between the captor and the merchants owning the cargo.

“ If the merchants refuse to enter into such an agreement, the captor may send the vessel home to the country whose commission he bears ; and in that case the merchants shall pay the freight which they were to have paid at the delivering port. And if any damage is occasioned by this proceeding, the captor is not bound to make compensation ; because the merchants had refused to treat respecting the ship after it had become lawful prize ; and for this further reason also, that the ship is frequently of more value than the cargo she carries. If on the other hand, the merchants are willing to come to a reasonable agreement, and the captor from arrogance, or other wrong motives, refuses to agree, and forcibly sends the cargo away, the merchants are not bound to pay the whole, nor any part of the freight ; and, besides, the captor shall make compensation for any damage he may occasion to them.

“ If the capture should be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheless, men of repute, and worthy to be trusted, the captor shall not send away the vessel, without being liable to the damage ; but if the merchants

are not men of known credit, and cannot make good their stipulated payment, he may then act as it is above directed.”<sup>f</sup>

It results from the above provisions that according to the usage of nations, at the time when this collection of maritime laws was compiled :

1. The goods of an enemy on board the ships of a friend were liable to capture and confiscation as prize of war, whilst the ship itself was free.

2. That the neutral master, in such a case, was entitled to his freight on the goods confiscated, as if they had been carried to the port of their original destination.

3. That the goods of a friend on board an enemy's ship were exempted from confiscation.

4. That the captors, who had seized the enemy's ship and carried her into their own port, were entitled to be paid the freight of the neutral goods, as if they had been carried to the port of their original destination.<sup>g</sup>

<sup>f</sup> *Collectanea Maritima*, No. V. Dr. Robinson's Translation of the Prize Chapters of the *Consolato del Mare*.

<sup>g</sup> “*Liber consularis maris editus est lingua Italica, in quem relatæ sunt constitutiones Imperatorum Græciæ, Alemanias, regum Francorum, Hispaniæ, Syriæ, Cypri, Balearium, Venetorum,—Genuensium, cujus libri, titulo CCLXIV, tractantur hujus generis controversiæ: ac sic definitur, si et navis et mercium hostium sint, rem esse in aperto, fieri ea capientium; si vero navis sit pacem colentium, merces autem hostium, cogi posse ab his qui bellum gerant navem ut merces eas in aliquem portum deferat, qui sit suarum partium, ita tamen ut vecturæ pretium nautæ solvatur. Si contra, navis hostilis fuerit, merces vero aliorum, de nave transigendum: aut, si nolint vectores transigere,—cogendos ut cum navi eant in portum aliquem partium capientis, et ut capienti solvant pretium quod navis debebatur.*” (*Grotius, de J. B. ac P. lib. iii. cap. 1, § 5, in Not.*)

See also Zouch, *Juris et Judic. Fecialis*, P. ii. § viii. No. 5, 6. Bynkershoek, 2 J. Pub. lib. i. chap. xiii–xiv. Heineccius, de Nav. ob Vect. Merc. Comm. cap. ii. §§ 8–9. Robinson's *Collectanea Maritima*, pp. 25–35. Note n. pp. 149, 171, 176.

M. Pardessus remarks upon this chapter. “Ce chapitre est un des plus curieux du Consulat, parcequ'il atteste les usages du moyen âge relativement à la question toujours controversée et toujours indécise, si le pavillon couvre la marchandise. Ce n'est point dans une simple note qu'il est possible de se livrer à une discussion sur ce point. Il suffit de reconnoître que,

The chapters of the *Consolato del Mare* relating to prize law were intended for the regulation of those associations of armed merchant vessels which sailed together for the double purpose of mutual protection against public enemies and pirates, and of making captures of enemies' property. But there is no express mention of any public commission from the sovereign of the captors, or a judicial condemnation of the prizes taken by them, as being necessary to authorize them to appropriate to their own use the booty thus acquired. The earliest legislative enactment requiring such a commission, and providing for a regular adjudication of the captures made under its authority in the courts of the captor's country is that contained in the French ordinance of Charles VI., anno 1400, and repeated in seve-

d'après les législations et les usages dont le consulat a été formé, on avoit admis pour principe, que la marchandise de l'ennemi, chargée sur un navire ami, étoit de bonne prise, et que la marchandise d'ami quoique chargée sur un navire ennemi, devoit être respectée. Ce principe se trouve dans un traité entre la ville de Pise et celle d'Aries de 1221, rapporté par Muratori, *Antiquitates Italicae mediæ ævi*, tom. iv. col. 398, dans deux traités d'Edouard iii. avec les villes maritimes de Biscaye et de Castile de 1351, et avec les villes du Portugal de 1353, rapporté par Rymer, tom. iii. partie i. pag. 71 et 88. Ce principe a souvent été modifié par des traités, et plus souvent par l'usage et la force. Il suffit de faire observer ici que, dans le système adopté par le *Consolato* il est impossible de ne pas reconnaître un droit de visite ou au moins de vérification du chargement. C'est à l'occasion de ce chapitre que Hubner dont il contrarieroit le système, a parlé avec mépris du Consulat." (Pardessus, *Collection des Lois Maritimes*, tom. ii. p. 303. Note (4))

Grotius, in the above cited passage, has adopted the almost universal tradition of jurists and legal antiquarians previous to his time, which attributed the *Consolato* to an Italian origin. But no tradition or authority can repel the stubborn fact that the *Consolato* exists in MSS., and in printed editions of an earlier date than any Italian copy, in a language which is neither Italian nor Latin, but in that dialect of the Romanz which was spoken in Catalonia in the thirteenth and fourteenth centuries, and which is still spoken without any modification of its original structure in that province where the first editions were published. (Pardessus, tom. ii. ch. xii. pp 16-42.)

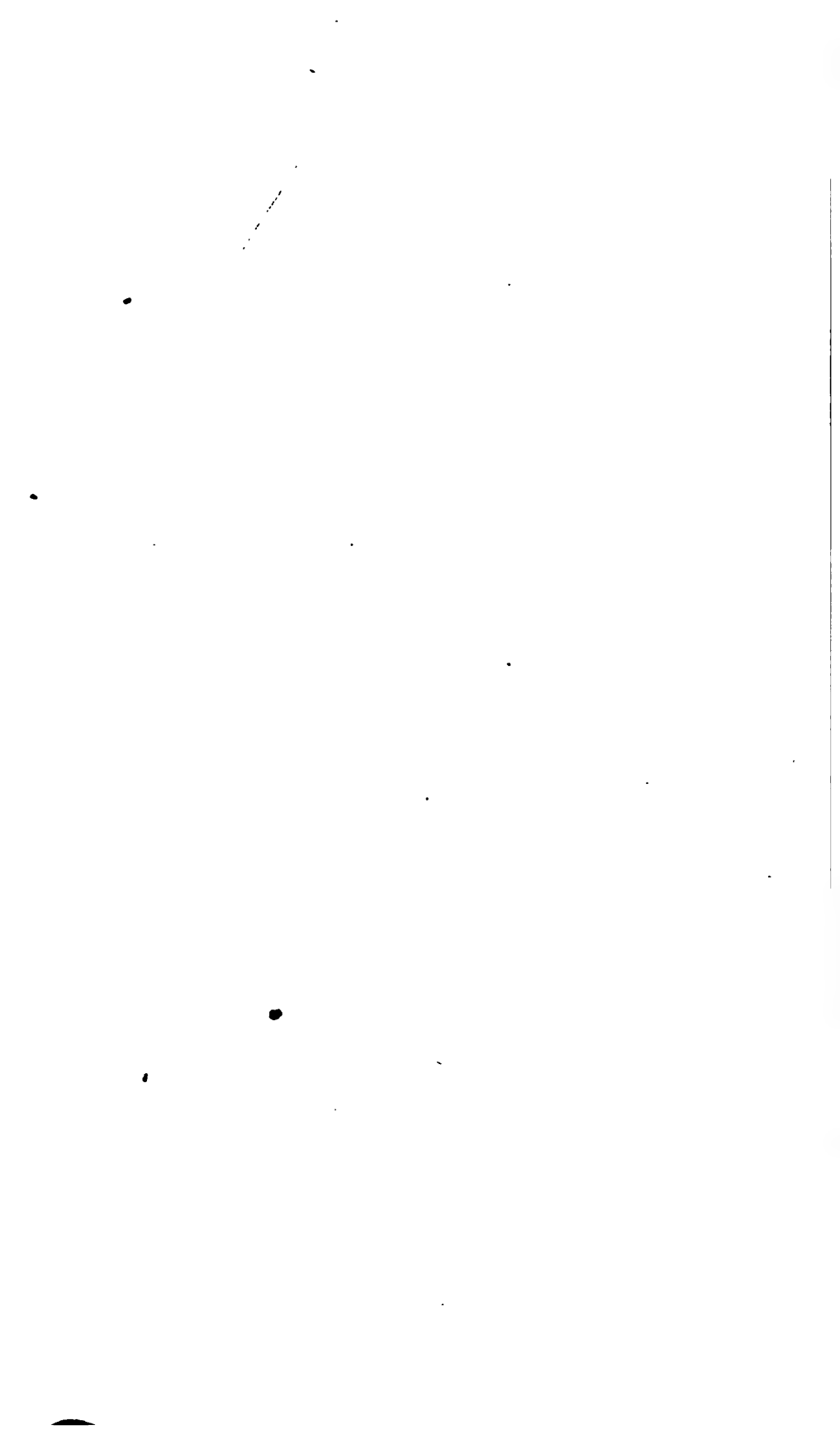
ral subsequent ordinances issued in the sixteenth century.<sup>h</sup> The sea laws and treaties of England about the same period evidently suppose a commission or letters of marque from the sovereign, (issued by the Lord High Admiral,) as essential to the validity of captures in war, and provide for the adjudication of the prizes thus taken before his lieutenants or deputies in like manner as in France.<sup>i</sup>

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<sup>h</sup> Valin, *Commentaire sur l'Ordonance de la Marine*, liv. 3, tit. 9, des *Prises*, art. 1.

<sup>i</sup> Martens, *Prises et Reprises*, ch. 1, § 1. Robinson, *Collectanea Maritima*, Advertisement, p. vii.





# HISTORY

## OF THE

### MODERN LAW OF NATIONS.

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#### PART FIRST.

HISTORY OF THE LAW OF NATIONS IN EUROPE FROM  
THE PEACE OF WESTPHALIA, 1648, TO THE PEACE OF  
UTRECHT, 1713.

THE peace of Westphalia, 1648, may be chosen as the epoch from which to deduce the history of the modern science of international law. This great transaction marks an important era in the progress of European civilization. It terminated the long series of wars growing out of the religious revolution accomplished by Luther and Calvin, and the struggle commenced by Henry IV. and Richelieu, and continued by Mazarin against the political preponderance of the house of Austria. It established the equality of the three religious communities of Catholics, Lutherans, and Calvinists in Germany, and sought to oppose a perpetual barrier to further religious innovations and secularizations of ecclesiastical property. At the same time it rendered the states of the empire almost independent of the emperor, its federal head. It arrested the progress of Germany towards national unity under the Catholic banner, and prepared the way for the subsequent developement of the

Peace of Westphalia.

power of Prussia—the child of the Reformation—which thus became the natural head of the protestant party and the political rival of the house of Austria, which last still maintained its ancient position as the temporal chief of the Catholic body. It introduced two foreign elements into the internal constitution of the empire—France and Sweden as guarantees of the peace, and Sweden as a member of the federal body—thus giving to these two powers a perpetual right of interference in the internal affairs of Germany. It reserved to the individual states the liberty of forming alliances among themselves as well as with foreign powers, for their preservation and security, provided these alliances were not directed against the emperor and the empire, nor contrary to the public peace and that of Westphalia. This liberty contributed to render the federative system of Germany a new security for the general balance of European power. The Germanic body, thus placed in the centre of Europe, served by its composition, in which so many political and religious interests were combined, to maintain the independence and tranquillity of all the neighbouring states.\*

The peace of Westphalia confirmed the political revolutions by which the Swiss Cantons and the United Provinces of the Netherlands had been severed from their ancient connexion with the empire. By recognizing the independence of these federal republics, so long existing in fact, and so long contested in right by the two branches of the house of Austria, it in effect recognized the principle of the right of popular resistance to intolerable oppression on the part of rulers. The new communities thus brought into existence, together with the free cities of Germany, (confirmed

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\* Herzberg, *Dissertation sur la Balance du Commerce et celle du Pouvoir lue devant l'Académie des Sciences et des Belles Lettres à Berlin*, 1786, p. 15.

Schoell, *Histoire abrégée des Traités de Paix*, tom. i. p. 182. *Hegel's Werke*, 9. Band, § 434, *Philosophie der Geschichte*.

in their regalian rights by the peace,) long served as places of refuge where the victims of religious and political intolerance in other lands found asylums, the security of which was seldom violated, and where the liberty of the press enabled them to appeal to the public opinion of Europe against the sentences of their powerful persecutors.

The peace of Westphalia continued to form the basis of the conventional law of Europe, and was constantly renewed and confirmed in every successive treaty of peace between its central states until the French revolution.

The peace of Westphalia was followed by that of the Pyrenees between France and Spain. The treaty of the Pyrenees, 1659, decided the long struggle for supremacy between the two monarchies, and prepared the way for the accession of the house of Bourbon to the Spanish throne by the marriage of Louis XIV. with the infanta Maria Theresa. The pacification of southern Europe was thus completed, whilst that of the north was secured by the treaties of Oliva and Copenhagen, 1660, terminating the contest between the ancient and the new religion in the Scandinavian kingdoms; confirming the succession of the house of Wasa to the throne of Sweden; and regulating the distribution of power and territory between Sweden, Denmark, and Poland.

The peace of Westphalia, closing the age of Grotius, coincides with the foundation of the new school of public jurists, his disciples and successors in Holland and Germany. The peace completed the code of the public law of the empire, which thus became a science diligently cultivated in the German universities, and which contributed to advance the general science of European public law. It also marks the epoch of the firm establishment of permanent legations, by which the pacific relations of the European states have been since maintained; and which, together with the appropriation of the widely diffused language of France, first to diplomatic intercourse, and subsequently to the discussions of international law, contributed

to give a more practical character to the new science created by Grotius and improved by his successors.

Constitution  
of the Germanic  
Empire.

The constitution of the Germanic empire, as finally adjusted by the peace of Westphalia, formed a singularly complicated political structure. It was composed of no less than three hundred and fifty-five different sovereign states, of various descriptions, feudal, ecclesiastical, and municipal, of unequal extent and relative importance. Among these were one hundred and fifty secular states, possessed and ruled by hereditary electors, dukes, landgraves, marquises, counts, and burgraves; one hundred and twenty-three ecclesiastical states, ruled by electors, archbishops, bishops, abbots, the grand masters of military orders of knighthood, priors, and abbesses, chosen for life; and of sixty-two imperial cities governed as republics.

Besides this difference of constitutional forms and relative political power, the states of Germany were divided by the still more marked distinction of religious faith into Catholic and Protestant. In the north and west of Germany were seated the powerful Protestant houses of Saxony, Brandenburg, and Hesse. The Catholic states were principally situated in the south and east, where the two sovereign houses of Austria and Bavaria had their extensive possessions; and along the Rhine, where the electorates of Mentz, Cologne, and Treves formed the leading ecclesiastical principalities.<sup>b</sup> Besides these, the archbishop of Salzburg possessed one of the most extensive territories of Germany, and was taxed for his military contingent to the federal army, according to the original *matricule*, established in the reign of Charles V., at the same rate with the most powerful elector of the empire. The bishop of Munster, who could raise 20,000 men for his separate wars; and the bishops of Wurtzburg, Bamberg, Liege, Paderborn, and

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<sup>b</sup> The emperor Maximilian, at the beginning of the 16th century, called the valley of the Rhine *Die Pfaffengasse*, (the street of priests.)

Hildesheim, who could each bring into the field from 5000 to 10,000 men, were reckoned among the most considerable sovereignties. The grand master of the Teutonic order and the four abbots of Fulda, Kempten, Murbach, and Weissemburg were the richest and most important heads of their order.

Among the principal sovereign houses that of Austria rose far above the rest. In addition to the lustre and real power of the Imperial crown, the German branch of the house of Hapsburg possessed Austria, Styria, Carniola, Hungary, and Bohemia. Next came the Palatine house, which was divided into two branches, of which the first possessed Bavaria, and had acquired the electoral dignity during the thirty years war; whilst the second held the Lower Palatinate, or that of the Rhine, with the electoral dignity, of which it had been deprived during the war, but which was restored to it by the peace of Westphalia. As the electoral house of Bavaria was Catholic, the ecclesiastical states of Germany bordering on the Rhine were placed under its peculiar protection. The archbishopric of Cologne, and the bishoprics of Munster, Paderborn, and Hildesheim, were usually filled by Bavarian princes.

The most considerable Protestant houses were those of Saxony and Brandenburg, both of which enjoyed the electoral dignity. The house of Saxony possessed the duchy of Saxony, Misnia, Thuringia, Upper and Lower Lusatia, the county of Henneberg, the duchies of Magdeburg and Coburg. The Albertine branch of that house, in which the electoral dignity was vested, now constitutes the royal house of Saxony; whilst the Ernestine branch is divided into the two stems of Weymar and Gotha, the latter of which consists of the three lines of Coburg, Altenburg, and Meiningen. The house of Brandenburg, less powerful than that of Saxony in the sixteenth century, had acquired during the seventeenth, under a succession of warlike, active, and able princes, an increased importance which was ultimately to render it the most powerful state in the north of Ger-

many. It already possessed the March of Brandenburg, ducal Prussia, part of Pomerania, the duchy of Crossen in Silesia, the bishoprics of Halberstadt, Minden, and Camin, all secularized and converted into principalities, the duchy of Cleves, the counties of Mark, and Ravensberg, with the expectative of the archbishopric of Magdeburg.

After the four sovereign houses of Austria, Bavaria, Saxony, and Brandenburg, the most considerable were those of Brunswick, and Luneburg, Wurtemberg, Hesse, Holstein, Baden, and Mecklenburg.

The legislative power of this vast confederacy was vested in the Diet of the Empire, composed of three colleges; that of the electors, that of the Princes, and that of the Imperial Cities. The assent of each of these three colleges was constitutionally necessary to a *recess*, or decree of the Diet, and the consent of each was determined by a majority of votes. But in practice, the dissent of the college of imperial cities was overruled by the concurrence of the other two colleges with the emperor.

The first college was composed of eight members, including the three ecclesiastical electors of Mentz, Cologne, and Treves, with the five secular electors, the king of Bohemia, the duke of Saxony, the marquis of Brandenburg, the duke of Bavaria, and the Palatine of the Rhine. The elector of Mentz, archchancellor of the Holy Roman Empire, was the president of this college.

The second college, that of the princes, was much more numerous and complicated in its organization. The two hundred and forty-six members, of which it was composed, were divided into three classes. The first class was that of the archbishops, bishops, abbots, grand masters of the military orders and abbesses. The second class included the dukes and landgraves of the same rank. The counts, barons, and burgraves formed the third class. The votes were divided according to the nature, extent and number of the sovereignties.

Some of the members of first class voted individually (*viritim*), others collectively (*curiatim*). The archbishops, abbots, and grand masters of the military orders, who were at the same time princes, voted individually. As a plurality of ecclesiastical principalities might be possessed by the same individual, the incumbent disposed of as many votes as the states he possessed might be entitled to according to the matricule of the empire. The prelates, who were not princes, although sovereign, were divided into two sections, each of which was entitled to one vote. The section of Swabia included fifteen abbots and five abbesses, whilst that of the Rhine was composed of eight abbots and eleven abbesses.

The second class of this second college included only princes having the right of individual suffrage. Some of these were entitled to a plurality of votes. Thus the king of Sweden was entitled to three for the duchies of Bremen, Verden, and farther Pomerania (*Verfommern*); the marquis of Brandenburg to five for the electorate, the principalities of Halberstadt, Minden, Camin, and hither Pomerania (*Hinterpommern*); the house of Hanover had four, &c.

The members of the third class, composed of counts *immediats*, amounting to one hundred and fifty in number, had only a collective vote of four suffrages.

The second college was alternately presided by the archbishop of Salzburg and the archduke of Austria.

The third college, that of the Imperial Cities, was divided into two benches; that of the Rhine, composed of twenty-five cities, and that of Swabia of thirty-seven cities. Each bench was entitled to a collective vote.

This complicated form of deliberation was observed in the proceedings of the general Diets where the emperor presided in person. In ordinary cases the Diet was composed of twenty-four deputies, representing the whole Germanic body, and consisting of four electors, six prince-bishops and one prelate, seven secular princes, two counts, and four deputies of cities. Five similar classes were de-



puted, each of which was called upon in rotation to attend the session of the Diet for six months, which thus composed the permanent deputation of the empire. The princes belonging to the class called upon to attend the session might appear in person or by deputy. In practice, the greater part of the twenty-four members, who represented the states of the empire, were themselves represented by delegates invested with their instructions and full powers. This organization was completed in 1654, and the Diet became permanent and continued to sit at Ratisbon from 1663 until the dissolution of the empire in 1806.\*

The decrees of the Diet thus constituted required the sanction of the emperor to give them the force of laws. The election of the emperor, originally popular, became gradually vested in the eight electors ; but from the uniform practice, which had long prevailed, of choosing the heir apparent of the house of Austria king of the Romans, the imperial crown had become in fact hereditary in that family.

The states of the empire were divided into ten circles, each of which was bound to furnish its military contingent to the federal army, and to execute the decrees of the Diet.

The judicial power was vested in the Imperial Chamber and the Aulic Council. The former tribunal, originally established by Maximilian I., was reorganized after the peace of Westphalia, and composed of four presidents and fifty assessors. The presidents, two of which were to be Catholics and two Protestants, were named by the emperor. Twenty-six of the assessors were to be Catholics, two of which were named by the emperor and the other twenty-four by the different Catholic electors and states of the empire. The other twenty-four were to be Protestants, and named by the different Protestant electors and states. The preponderance thus secured to the Catholic party in the

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\* Mignet, *Negociations relatives à la Succession d'Espagne*, tome ii. pp. 8—12.

supreme tribunal of the empire was qualified by a stipulation in the treaty of Osnabruck, that in all cases arising out of religious matters between Protestants and Catholics, the controversy should be determined by an equal number of judges selected from both confessions.

The same course was pursued in the Aulic Council in similar cases. The authority of this tribunal over the members and subjects of the empire was sometimes contested by the Protestant party, but it continued to exercise in many cases concurrent jurisdiction with the Imperial Chamber until the final dissolution of the empire.<sup>b</sup>

Such is a brief outline of the constitution of the Germanic empire as finally organized by the treaties of Westphalia, 1648, and by the recess of the Diet of Ratisbon, 1662. It has been well observed that "whatever might have been its defects, and many of them seem to have been susceptible of reformation without destroying the system of government, it had one invaluable excellence: it protected the rights of the weaker against the stronger powers. The law of nations was first taught in Germany, and grew out of the public law of the empire. To narrow, as far as possible the rights of war and conquest, was a natural principle of those who belonged to petty states, and had nothing to tempt them in ambition."<sup>c</sup>

It will perhaps be found convenient to divide the history of international law since the peace of Westphalia into distinct epochs.

The *first* of these may comprise the period which elapsed between the peace of Westphalia, 1648, and that of Utrecht, 1713.

The *second* will include the period from the peace of Utrecht, 1713, to the treaties of peace concluded at Paris and Hubertsburg in 1763.

<sup>a</sup> Schoell, *Histoire abrégée des traités de paix*, tome i. ch. 1. s. 4.

<sup>c</sup> Hallam, *Middle Ages*, vol. i. ch. 5.

The *third* extends from the peace of Paris and Hubertsburg, 1763, to the French revolution, 1789.

The *fourth* from the French revolution, 1789, to the Congress of Vienna, 1815.

#### FIRST PERIOD.

§ 1. First  
Period from  
the peace of  
Westphalia to  
that of Ut-  
recht.

The intermediate period between the peace of Westphalia and that of Utrecht was filled with a series of wars, growing out of the ambitious projects of Louis XIV, seeking to extend the frontiers of France towards the Rhine, and to secure for his dynasty the rich inheritance of Spain and the Indies on the extinction of the male line of the Spanish branch of the house of Austria. During this period the progress of these wars was occasionally suspended by the peace of Aix la Chapelle in 1668, of Nimiguen in 1678, and of Ryswick 1697. Each of these treaties was in fact a mere temporary truce, in which the contending parties sought only to gain time and strength to renew the struggle. In this protracted contest the republic of the United Provinces became alternately the ally and the enemy of France and England, as the apprehensions from the territorial aggrandizement of the one, or the commercial rivalry and naval domination of the other predominated in the councils of Holland.

The history of this long series of wars, and of the negotiations by which they were occasionally suspended, is fruitful in examples of the progress which the law of nations continued to make, in spite of the practical violation of its precepts too often occurring in the intercourse of states. The revolutions of Holland and Switzerland had been confirmed by the peace of Westphalia, 1648. The civil war between Charles I. and his people, consummated at the same moment by the establishment of the English commonwealth, insulated the British islands more than ever from the political system of the continent. Cromwell's diplomacy resembled that of Napoleon in point of energy ; but it aimed at conservation, not conquest. Cardinal Mazarin, looking only to political and commercial interests, did

not hesitate to recognize the government of an usurper who had shed the blood of his sovereign on the scaffold. He avowed the maxim that the relations of amity and commerce between states had no necessary connection with the form of their respective governments, and sought to maintain the good understanding between France and England by a religious execution of the subsisting treaties which had been made with the dethroned and banished house of Stuart.<sup>4</sup> It was only when the revolution of 1688 placed at the head of the British government an active and able prince, who formed the continental alliance by which the ambitious designs of Louis XIV were baffled, that the latter monarch embraced the cause of the Stuarts; motives of political interest coinciding with the principle of legitimacy and the divine right of kings. During all this period, the influence of the writings of the publicists, including Grotius and his successors, was perceptibly felt in the councils and conduct of nations. The diplomacy of the seventeenth century was learned and laborious in the transaction of business. Its state papers are filled with appeals, not merely to reasons of policy, but to the principles of right, of justice, and equity; to the authority of the oracles of public law; to those general rules and principles by which the rights of the weak are protected against the invasions of superior force by the union of all who are interested in the common

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<sup>4</sup> Mazarin's envoy to the English Parliament, de Neuville, in his public audience, laid down the principles of international policy on which the French government proceeded in the following terms: "L'union qui doit être entre les états voisins ne se règle pas suivant la forme de leurs gouvernemens; c'est pourquoi qu'il ait plu à Dieu par sa providence de changer celle qui étoit ci devant établie dans ce pays, il ne laisse pas d'y avoir une nécessité de commerce et d'intelligence entre la France et l'Angleterre. Ce royaume a pu changer de face, et de monarchie devenir république, mais la situation des lieux ne se change point. Les peuples demeurent toujours voisins et intéressés l'un avec l'autre par le commerce. Par ces considérations importantes au bonheur de deux Etats si puissans, il semble que ceux qui en ont la conduite doivent employer tous leurs soins pour prévenir les inconvéniens capables d'altérer en quelque sorte les anciennes alliances."

danger. In the present age these laborious discussions appear superfluous and pedantic. These general principles are taken for granted, and it is not thought necessary to demonstrate them by reasoning or the authority of the learned. But in the times of which we speak they had not yet acquired the force of axioms, and required to be fortified by argument and an appeal to testimonies, which showed the general concurrence of enlightened men on those rules of justice, which regulate, or ought to regulate the intercourse between nations.

§ 2. Principle of intervention to maintain the balance of power.

Among the principles constantly appealed to in the diplomatic discussions of this period was that of the right of intervention to prevent the undue aggrandizement of one European state affecting the general security and independence of nations by materially disturbing the equilibrium of their respective forces. Whatever disputes might arise as to its application, the principle itself was acknowledged on all hands, although it was not always accurately distinguished from the right of interference by one state, or a number of states, in order to obviate a danger arising from the internal transactions of a neighboring state. The idea of a systematic arrangement for securing to states within the same sphere of political action the undisturbed possession of their existing territories, is, as we have already seen, as old as the science of politics itself. The system of the balance of power, was theoretically understood, if not practically adopted by the ancient states of Greece and the neighboring nations.\* Still it must be admitted that the first practical application of the balancing system to that constant supervision, which has been since habitually exercised over the relative forces of the European states, can only be distinctly traced back to the developments their policy received soon after the invasion of Italy by Charles VIII at the end of the fifteenth century. The princes and

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\* See introduction, p. 1.

republics of that country extended on this occasion to the affairs of Europe the maxims they had hitherto applied to regulate the balance of power among the Italian states.<sup>f</sup> During the sixteenth century the long and violent struggle engendered by the religious reformation in Germany spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant powers mutually protected the adherents of their own faith in the bosom of rival states. The repeated interference of Austria and Spain in favor of the Catholic faction in France, Germany, and England, and of the Protestant powers to protect their persecuted brethren in Germany, France, and the Netherlands gave a peculiar colouring to the political transactions of the age. This was still more heightened by the conduct of Catholic France, under the administration of Cardinal Richelieu in sustaining by a singular refinement of policy the Protestant princes and people of Germany-against the house of Austria, whilst he repressed with a severe hand the Calvinistic reformers of France. The liberties of the German protestants were secured by the peace of Westphalia, guaranteed by France and Sweden : but the right reserved by the peace to the states of the Empire of forming alliances among themselves and with foreign powers, was first exercised in 1651, by the formation of the league of the Rhine concluded between the electors of Mentz, Cologne, Treves, Bavaria, the bishop of Munster and the count palatine of the Rhine. The Protestant princes of Germany, with Sweden at their head, followed this example by concluding a similar alliance at Hildesheim in 1651. This alliance consisted of the king of Sweden, as duke of Bremen and Verden, the dukes of Brunswick, Luneburg, Zell, Wolfenbuttel, and Hanover, and the landgrave of Hesse Cassel. These two leagues were united together in the alliance of the Rhine concluded

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<sup>f</sup> Robertson's Charles V., Vol. i. View of the Progress of Society in Europe, sect. 2.

at Frankfort in 1658, to which Louis XIV acceded, and which was intended to secure the neutrality of the empire in the war which still continued between France and the Spanish branch of the house of Austria.

Opinion of  
Fenelon.

The principle of intervention in order to maintain the balance of power is stated with great accuracy, and at the same time great moderation, by Fenelon in his *Examen de la Conscience sur les Devoirs de la Royauté* written for the instruction of his pupil the duke of Burgundy. In this work he cites, as an example of the cases in which the principle became applicable, the undue aggrandizement of the house of Austria under Charles V. and his successor Philip II. who after having conquered Portugal sought to make himself master of England. Supposing his right to the English crown to have been as incontestible, as it was manifestly unfounded, Fenelon asserts the right of Europe to prevent the addition of the British islands to the vast dominions of Spain, Italy, Flanders, and the East and West Indies, which together with his immense naval power, would have enabled him to dictate laws to all the other states of Christendom. "A particular right of succession or donation," says he, "ought to yield to the natural law of security for so many nations. In one word whatever disturbs the equilibrium, so as to render imminent the danger of universal monarchy, cannot be just even when founded on the written laws of a particular country. The reason is that these laws established by one people cannot prevail against the natural law of the general liberty and safety written upon the hearts of all the other nations of the world. When a given power is manifestly rising to that point in the scale of nations where all the neighboring powers combined would be incapable of opposing effectual resistance, they have a right to unite together for the purpose of preventing this aggrandizement before it is too late to defend their common independence. But to render such an alliance lawful, the danger must be imminent and real. In general, a defensive alliance only, is, in such a case, allow-

able ; and it can only be rendered offensive where the aggressive design renders it indispensably necessary ; and even in such cases the treaties of offensive alliance ought to specify with great exactness the objects of the league so as not to destroy a power under the pretext of moderating it.

“Defensive leagues are then just and necessary when they are truly designed to prevent the undue aggrandizement of a particular power so as to endanger the general safety. The power in question has no right to consider such an alliance as a ground of hostility, since it is formed in the exercise both of a right and a duty on the part of the contracting states.

“As to an offensive alliance, it depends upon circumstances : it must be founded upon some positive infraction of the existing peace, the invasion of an ally's territory, or some other ground of peril equally certain and imminent. Even in such a case, as I have already observed, such treaties should be restrained within such limits as may prevent, what is but too often seen that a particular nation may unite with others to abate, the aggrandizement of one power which threatens the establishment of universal tyranny merely in order to take its place.”<sup>ε</sup>

After laying down these general principles, he proceeds to apply them practically to regulate the policy of Europe, and inculcates the system France ought, in his opinion, to pursue in her relations with the neighboring states ; a system very different from that actually pursued by Louis XIV. His natural and reasonable policy would seem to have been to preserve the preponderance of France over both branches of the house of Austria, as secured by the peace of Westphalia and that of the Pyrénées, instead of seeking to disturb the state of possession established by those treaties. His ambitious projects threatened the in-

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<sup>ε</sup> Oeuvres de Fenelon, tom. III. p. 361. ed. 1835.



dependence of Holland, and with it, the security of Germany and the Spanish Netherlands. The coalition of the Empire, Spain and the United Provinces, against France was dissolved in 1678 by the peace of Nimiguen, which secured to the latter a considerable accession of territory, and planted the seeds of another war which broke out in 1689. The revocation of the edict of Nantz, 1682, produced a reaction against the Catholic principle represented by Louis XIV. His alliance with James II. for the purpose of rendering that monarch absolute and establishing the Catholic religion in England, precipitated the revolution of 1688, which seated the Stadtholder of Holland on the English throne by the choice of the nation. The accession of England to the league of Augsburg completed the confederacy of the Protestant states of Europe with the Catholic house of Austria, including both its German and Spanish branches, against the new danger with which Europe was menaced from that power which under Henry IV. and Richelieu had saved it from the universal monarchy of that same house of Austria. William III. placed himself at the head of the principle which had raised him to the throne. The fortune of war compelled Louis XIV. to give up all his conquests, and to acknowledge the Protestant usurper as a lawful sovereign at the peace of Ryswick, 1692.

Spanish succession war,  
1701—1713.

The male line of the Spanish branch of the house of Austria was about to become extinct in the person of Charles II. The succession to the vast dominions of the Spanish monarchy was claimed by the reigning houses of France, Austria, and Bavaria, all deriving their titles through females who, by the ancient laws of Spain were capable of inheriting and transmitting the inheritance. The claim of the house of Bourbon had been expressly renounced by the treaty of marriage between Maria Theresa and Louis XIV. But this renunciation did not prevent the latter from claiming this rich inheritance for the descendants of that marriage. During the long and complicated negotiations,

to which the question of the Spanish succession gave rise, his object was to secure a portion of this inheritance, and above all to prevent its being entirely grasped by Austria. The object of the Spanish nation was to prevent the dismemberment of their monarchy; and that of Europe to prevent the crowns of France and Spain, or of Austria and Spain, being united on the same head, which might give to the house of Bourbon or to the house of Austria a fatal preponderance. William III. was induced, for the sake of maintaining peace and the continental balance of power, to consent to the treaty of partition proposed by Louis XIV. and signed at the Hague in 1698, between France and the two maritime powers, England and Holland; by which Spain, the Indies, Belgium, and Sardinia were assigned to the electoral prince of Bavaria; the kingdom of Naples and Sicily, the Spanish places and islands upon the coasts of Tuscany, the marquisate of Final, and the province of Guipuzcoa, to the dauphin of France; and the Milanese to the Archduke Charles. The Spanish court remonstrated against this treaty as contrary to the fundamental laws of the monarchy and the independence of the nation. These remonstrances were answered by an appeal to the right of intervention, in order to prevent the reconstruction of the monarchy of Charles V. with its menacing preponderance of forces, and the alternative danger of uniting the crowns of France and Spain.<sup>a</sup> Charles II., roused from his lethargy by this attempt to dispose of his dominions during his life, made a testament by which he declared the electoral Prince of Bavaria his universal heir, and by which he hoped to preserve the integrity of the Spanish monarchy whilst he sacrificed the pretensions of the German branch

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<sup>a</sup> M. de Torcy repondit " qu'il s'agissoit d'un traité secret et de pure éventualité, et que le droit public européen n'empêchoit pas que les puissances intéressées ne prissent les précautions nécessaires pour empêcher que la monarchie de Charles Quint ne fût reconstituée avec toutes ses forces menaçantes pour l'indépendance et la sûreté des autres Etats."

of his own house. The Prince of Bavaria having died, a second treaty of partition between the same parties was concluded in 1700, by which Spain and the Indies, Belgium, and Sardinia were given to the Archduke Charles, and the share of the succession allotted by the first treaty to the dauphin was augmented with the duchies of Lorraine and Bar. Charles II., equally dissatisfied with this arrangement as with the former, made a new testament in favour of the Duke d'Anjou, grandson of Louis XIV. and Maria Theresa. A long and bloody war was the consequence of the acceptance of this testament by Louis XIV., which was finally terminated by the peace of Utrecht, 1713.<sup>1</sup>

§ 3. Peace  
of Utrecht,  
1713.

The peace of Utrecht was for France what that of Munster had been for the house of Austria. The emperor Joseph I, having died without male heirs, and his brother the archduke Charles having succeeded him, the junction of the Spanish monarchy with the Austrian branch was again apprehended by the powers interested in maintaining the continental equilibrium, who had already reduced the power of France so low by the events of the war that they preferred to recognize the claim of a younger branch of the

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<sup>1</sup> M. Mignet, in the introduction to his edition of the documents relating to the Spanish succession, has shown that Louis XIV, by accepting the crown of Spain for his grandson the Duc d'Anjou, not only violated the faith of treaties, but departed from all the rules of sound policy. The second treaty of partition of 1700 secured to him the means of obtaining for France her natural boundary of the Rhine and the Alps, by exchanging a part of the Italian possessions, assigned to the dauphin by that treaty, for the Spanish Low Countries, Savoy, and the county of Nice. M. Mignet well observes: "Louis XIV. avait à choisir entre une couronne pour son petit fils, ou un aggrandissement de ses états soutenu par l'Europe; entre l'extension de son système au delà des Pyrénées et des Alpes, par l'établissement d'une branche de sa maison en Espagne et en Italie, et une extension de sa propre puissance; entre l'honneur de la royauté et l'avantage de son royaume; entre sa famille et la France." He preferred the interest and honour of his family to those of his country. (Mignet, *Négociations relatives à la Succession d'Espagne sous Louis XIV.*, tom. i. *Introd.* p. lxi.

house of Bourbon to the crown of Spain upon condition that it should never be united to that of France. The treaties of Utrecht established this separation as one of the fundamental rules of European public law ; whilst it severed Belgium, Milan, and Naples from the Spanish monarchy, and settled them upon the house of Austria. The conditions of the peace embraced a practical application of the principle of interference to preserve the balance of power, though the same results might have been obtained by executing the partition treaties without the enormous expense of blood and treasure caused by the Succession war. It was objected to these treaties that they were framed with a single view to the security of Europe, and without reference to the consent of the Spanish nation, or to the welfare of the states thus parcelled out. But the danger against which the partition treaties were intended to guard was precisely the same which was afterwards made the ground of war ; and a danger which, according to the opinion of the age, was sufficient to justify the war, could not but be deemed sufficient to justify the provisions intended to prevent it.

The peace of Utrecht once more sanctioned the legitimacy of the English revolution of 1688, and guaranteed the Protestant succession to the British crown in the house of Hanover, as it had been settled by act of parliament. The cause of the Stuarts was thus finally abandoned by France, and with it the principle of hereditary, indefeasible right on which it was founded. The treaties of Utrecht were constantly renewed and confirmed from this time forth in every successive treaty of peace between the great continental and maritime powers until the peace of Luneville, 1800, and that of Amiens, 1803, when they were for the first time omitted. The only material alteration, during all this period, in the territorial arrangements stipulated by this great compact was that provided by the treaty of Vienna, 1738, which transferred the crown of the two Sicilies to a branch of the house of Bourbon. In other respects the

territorial arrangements of the south of Europe continued to rest until the French revolution, and still continue to rest upon the basis of the peace of Utrecht.\*

§ 4. Public jurists of the latter half of the seventeenth century.

The event of the thirty years war in Germany had brought upon the European scene a power which had before played but a secondary and subordinate part. Sweden was one of the new and foreign elements introduced into the federative system of Germany by the peace of Westphalia. The arms of Gustavus Adolphus had enabled the Protestant and anti-imperial party to dictate the terms of that peace; and the weight of Sweden was henceforth felt in the balance of Europe, as a mediating power, whose interests were connected with the rights of neutrality and the maintenance of the equilibrium she had contributed to establish. Her diplomats were public jurists, and her public jurists were diplomats. Grotius had been the ambassador of his adopted country at Paris. The son of Grotius was the Swedish ambassador in Holland, at the time when that republic, whose very existence was threatened by the mighty power of Louis XIV, excited the general interest of Europe in favour of a people who had redeemed their country from the ocean in order to make it one of the bulwarks of the independence of nations.

§ 5. Puffendorf, b. 1632. d. 1689.

Puffendorf, a native of Saxony, one of the publicists formed in the school of Grotius, was retained by the Swedish ambassador at the court of Copenhagen as the governor of his children. On the breaking out of the war in 1658 between Denmark and Sweden, when the Danish islands were invaded by Charles IX, Puffendorf was detained as a prisoner by the Danes with the other members of the ambassador's family. This practical infraction of the law of nations in his own person turned his thoughts to the foundations on which its obligation was supposed to rest; and he beguiled the tedium of an eight months im-

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\* Mignet, *Negotiations relatives à la Succession d'Espagne*, tom. i. Introd. p. xcviil.

prisonment in meditating upon his past reading, not being allowed the aid of books. He thus digested from his recollections of Grotius and Hobbes a compilation which he afterwards published under the title of *Elements of Universal Jurisprudence*. In this little work he professes to follow the method of the geometers, laying down his definitions and axioms, and demonstrating his conclusions with a strict mathematical accuracy, which it is now generally acknowledged that moral reasonings do not allow. Still this treatise brought him into public notice among the patrons of the new science of Natural Jurisprudence then so much in vogue. The Elector Palatine Charles Louis, to whom it was dedicated, called him to the chair of the Law of Nature and Nations which that enlightened prince had founded in the still renowned university of Heidelberg. In his public lectures, Puffendorf used the treatise of Grotius *De Jure Belli ac Pacis* as his text book ; which according to his own account, convinced him of the want of a more exact and complete work on the science of Natural Jurisprudence. In reply to the advice of a minister of one of the German princes exhorting him to undertake such a work, Puffendorf answered that it "would require a penetrating intellect, an exquisite judgment free from all prejudice, a vast library, long leisure and correspondence with many learned men, all which things he lacked. Nevertheless he would undertake it." In 1670 he was offered, and accepted the professorship of jurisprudence established in the University of Lund by Charles XI, of Sweden. Two years subsequently he published his great work *De Jure Naturæ et Gentium*, which he abridged under the title *De Officiis Hominis et Civis*. These works were soon translated into the principal languages of Europe, widely diffused, studied, and commentated. A mighty importance was then attributed to the study of the writings of the publicists, which strongly contrasts with the almost total neglect into which they have now fallen. Even that judicious philosopher, Locke, in his treatise on education, says that

when the pupil has well digested Cicero's Offices, and the smaller work of Puffendorf on the Duties of Man and the Citizen, he should be made to read Grotius on the Laws of War and Peace, or what is perhaps a still better work, Puffendorf on the Law of Nature and Nations, in which he may instruct himself in the natural rights of man, the origin and foundations of society, and the duties which thence result.

In point of style, genius, and learning far inferior to Grotius, the work of Puffendorf, like that of his great predecessor, is strewed with a profusion of quotations from ancient authors, sacred and profane, which very often have little or no application to the matter in hand, and are not seldom misunderstood by the writer. Grotius had used the testimony of philosophers, historians, poets, and even of orators, in order to show the concurrence of many minds of different ages and countries in the same sentiment, from which he deduces that general consent which in his opinion constitutes the obligatory force of those rules which ought to regulate the intercourse between nations. We shall hereafter see that Puffendorf's theory of the nature and obligation of international law was widely different, and he has therefore less excuse for conforming in this respect to what it must be confessed was the prevailing taste of the age. What La Bruyere says of those who are affected with this mania of quotation may well be applied to Puffendorf. "*Herille, soit qu'il parle, qu'il harangue ou qu'il écrive, veut citer : il fait dire au prince des philosophes, que le vin enivre, et à l'orateur romain que l'eau le tempère. S'il se jette dans la morale, ce n'est pas lui, c'est le divin Platon qui assure, que la vertu est aimable ; le vice odieux ; ou que l'un ou l'autre se tournent en habitude ; les choses les plus communes, les plus triviales, et qu'il est même capable de penser, il veut les devoir aux anciens, aux Latins, aux Grecs.*"<sup>1</sup>

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<sup>1</sup> La Bruyere, Caractères, tom. ii. ch. 12.

In order to determine how far the science of international law was advanced by the labours of Puffendorf it is necessary to examine in what state it was left by Grotius. That celebrated writer used the term natural law as comprehending those rules of justice which would govern the conduct of men, as moral and accountable beings, supposing them to live in a social state independently of positive human institutions, or as it is commonly expressed, living in a *state of nature*. "Natural law," says he, "is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational, and social nature, and that consequently such actions are either forbidden or enjoined by God the author of nature. Actions which are the subject of this exertion of reason are in themselves lawful or unlawful, and are, therefore, as such necessarily commanded or prohibited by God."<sup>m</sup>

Grotius distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations as evidenced in their usage and practice. In the introduction to his treatise on the laws of war and peace, he says :

"I have used in favour of this law the testimony of philosophers, historians, poets, and even of orators : not that they are indiscriminately to be relied on as impartial authority ; since they often bend to the prejudice of their respective sects, the nature of their argument, or the interest of their cause ; but because when many minds of different ages and countries concur in the same sentiment it must be referred to some general cause. In the subject now in question this cause must be either a just deduction from the principles of natural justice, or *universal consent*. The first discovers to us the natural law, the second the law of nations.

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<sup>m</sup> Grotius, de J. B. ac P. lib. i. cap. i. § x. 1, 2.



In order to discover these two branches of the same science, we must consider not merely the terms which the authors have used to define them, (for they often confound the terms natural law and law of nations,) but the nature of the subject in question. For if a certain maxim, which cannot be fairly inferred from admitted principles, is, nevertheless, found to be every where observed, there is reason to conclude that it derives its origin from *positive institution*.<sup>a</sup>

He afterwards states that the law of nations derives its obligatory force from the positive consent of all nations, or at *least of several*. "I say of several, for except the natural law, which is also called the *Jus Gentium*, there is no other law which is common to all nations. It often happens too that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place in respect to prisoners of war and the *jus posthumini*."<sup>o</sup>

Without stopping to inquire in what respects the definition of natural law by Grotius is defective, or in what respects it differs from the notions on the same subject inculcated in no very clear or intelligible terms by Puffendorf, we may proceed to observe that the latter differs entirely from the former in respect to his ideas of the nature and obligation of the law of nations. In order to make himself more clearly understood on this head, Puffendorf borrows the faultless language of that most clear and precise of writers, Hobbes, who divides "the natural law into the natural law of men; and the natural law of states, commonly called the law of nations. The precepts of both are the same; but since states, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men, we call the law of

Hobbes, b.  
1588, d. 1679.

<sup>a</sup> Grotius, de J. B. ac P. Proleg. § xli.

<sup>o</sup> Grotius, de J. B. ac P. lib i. cap. i. § xiv. 4.

nature, is called the law of nations when applied to whole states, nations, or people."P To this opinion Puffendorf implicitly subscribes, declaring that he recognizes "no other sort of law of nations, voluntary or positive, at least which has the force of law properly so called, binding upon nations as emanating from a superior."<sup>4</sup>

In using this qualification of the term law *properly so called as emanating from a superior*, Puffendorf seems to show that he had caught a glimpse of the truth. It may indeed be well doubted how far the rules which have been adopted to govern the conduct of the independent societies of men called states can with strict propriety be termed *laws*. An able writer on jurisprudence of our own times has well observed that "laws," (properly so called) "are commands proceeding from a determinate rational being, or a determinate body of rational beings to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled laws by an analogical extension of the term. Such are the laws

<sup>P</sup> Hobbes, *de Cive*, cap. xiv. § 4. A few copies of this work were printed at Paris, and privately circulated by the author in 1642, but the book itself was not published until 1647. (Stewart, *Prelim. Dissertation on the Progress of Metaphysical and Ethical Philosophy since the Revival of Letters in Europe*, p. 90.)

"As a writer on the law of nations, Hobbes is now altogether unworthy of notice. I shall therefore only remark on this part of his philosophy, that its aim is precisely the reverse of that of Grotius; the latter labouring through the whole of his treatise to extend, as far as possible, among independent states, the same laws of justice and humanity which are universally recognized among individuals; whilst Hobbes by *inverting* the argument exerts his ingenuity to show that the moral repulsion which commonly exists between independent and neighbouring communities is an exact picture of that which existed among individuals prior to the origin of government." (Stewart, *ib.*)

<sup>4</sup> Puffendorf, *De Jure Nat. et Gent. lib. ii. cap. iii. § xxiii.*

which regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations or international law. This law obtaining between nations is not positive law ; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule regarding the conduct of sovereign states, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations or sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions : by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected."<sup>r</sup>

After denying that there is any positive or voluntary law of nations founded on the consent of nations, and distinguished from the natural law, or those rules of justice by which all moral beings are bound, Puffendorf proceeds to qualify this opinion by admitting that the usage and comity of civilized nations has introduced certain rules for mitigating the practice of hostilities between them ;—that these rules are founded upon tacit consent ;—and that their obligation ceases by the express declaration of any party engaged in a *just war* that he will no longer be bound by them. Now it is obvious that the obligation of the law is here confounded with the sanctions by which it may be enforced. There can be no doubt that any belligerent nation, which chooses to withdraw itself from the obligation of the law of nations in respect to the manner of carrying on war against another state, *may* do so at the risk of incurring the penalty of vindictive retaliation. Still it is not

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<sup>r</sup> Austin, Province of Jurisprudence, determined, pp. 147-8, 207-8. London, 1832.

true that the natural law furnishes the sole measure of the rights of war between nations. For, as has been well observed by a great civilian of the present age, "a great part of the law of nations stands upon the usage and practice of nations. It is introduced indeed by general principles" (of natural law) "but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and say that mere general speculation will bear you out in a further progress. For instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner in which it is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes."<sup>a</sup>

The same remark may be made as to what Puffendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Puffendorf says they depend either upon natural law which gives to public ministers a sacred and inviolable character, or upon consent, as evidenced in the usage of nations conferring upon them certain privileges which may be withheld at the pleasure of the state where they reside. The distinction here made between those privileges of ambassadors which depend upon natural law, and those which depend upon custom and usage, is wholly groundless; since both one and the other may be disregarded by any state which chooses to incur the risk of retaliation or hostility,

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<sup>a</sup> Sir William Scott, (Lord Stowell,) *Robinson's Adm. Reports*, Vol. i. p. 140.

these being the only sanctions by which the duties of international law can be enforced. "The law of nations," says Bynkershoek, "is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary. I hold the rule to be general as to every privilege of ambassadors, and that there is no one they can pretend to enjoy against the express declaration of the sovereign, because an express dissent excludes the supposition of a tacit consent and there is no law of nations except between those who voluntarily submit to it by tacit convention."<sup>1</sup>

Still it is not the less true that the law of nations, founded upon usage, considers an ambassador, duly received in another state, as exempt from the local jurisdiction by the consent of that state, which consent cannot be withdrawn without incurring the risk of retaliation or of provoking hostilities on the part of the sovereign by whom he is delegated. The same thing may be affirmed of all the usages which constitute the law of nations. They may be disregarded by those who choose to declare themselves absolved from the obligation of that law, and to incur the risk of retaliation from the party specially injured by its violation, or of the general hostility of mankind.

A very small part of the work of Puffendorf is occupied with the exposition of the rules which govern, or ought to govern, the intercourse of those independent communities which acknowledge no common superior but the supreme governor of the universe. The rest of it is employed in the exposition not only of the rules of justice, including the respective rights and obligations of sovereign and subject, but of all the other duties of public and private morality. The notion of natural law formed by Puffendorf, and the other publicists of the same age, includes in the aim of that science, not only the rules of justice, but the rules enjoined

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<sup>1</sup> Bynkershoek, *De Foro Legatorum*, cap. xviii. § vi.

ing all our other moral duties, thus identifying its objects with that of ethics or moral philosophy. That part of his work which treats of International Law, properly so called, comprises the five last chapters of his eighth book, consisting of little else than a mere compilation from Grotius and his commentators ; unenlightened by a single ray of original genius or sound criticism, and in which we seek in vain for those complete and precise details which are justly regarded by more modern publicists as essential to the practical application of general principles. These defects would seem almost to justify the severe judgment of Leibnitz, who calls Puffendorf "*Vir parum jurisconsultus, et minime philosophus*;" and who has left on record a masterly refutation of the fundamental principles of natural law which form the basis of Puffendorf's work. According to this great philosopher, it fell far short of its aim as a systematic treatise of Natural Jurisprudence. "*Inspexi opus, quod a multo tempore non consueveram, deprehendique principia defectibus non exiguis laborare. Quam tamen pleræque sententiæ in progressu non admodum principiis cohereant, neque ex iis tamquam causis deducantur, sed potius aliunde ex bonis auctoribus mutuis sumantur ; nil prohibet, libellum multa bona frugis continere, et vicem compendii doctrinæ de jure naturæ iis præstare, qui, levi aliqua tinctura contenti, scientiam solidam non adfectant, quales sunt nimis multi auditores. Optarem tamen exstare aliquid firmitus et efficacius, quod lucidas fæcundasque definitiones exhibeat, quod ex rectis principiis conclusiones veluti filo deducat, quod fundamenta actionum exceptionumque naturæ validarum omnium ordine constituat, quod denique scientiæ alumni certam rationem præbeat pretermissa supplendi, oblatasque quæstiones per se decidendi, determinata quadam via. Hæc enim a scientia absolute et rite tradita exspectari debent.*" In looking about him for those capable of achieving such a work he saw but two minds which might seem equal to the mighty task. "So great an enterprise might have been executed by the deep

searching genius of Hobbes if he had not set out from evil principles ; or by the judgment and learning of the incomparable Grotius, if his powers had not been scattered over many subjects, and his mind distracted by the cares of an agitated life."<sup>u</sup>

This opinion is strikingly contrasted with the extravagant praises bestowed upon the works of Puffendorf by some of his cotemporaries, whose admiration was excited by the novelty of his extension of the province of Natural Jurisprudence to the science of Morals, with which it soon came to be identified. As such these works became the text books of the professors of ethics in some of the most enlightened universities of Europe, and were regarded as indispensable manuals in every system of accomplished education. But an impartial comparison of his writings with those of his predecessors obliges us to say, that he left the science of International Law in the same state in which he found it, so far as it respects any positive improvement in its principles. Still the indirect influence of the works of Puffendorf, and the other publicists formed in the school of Grotius, however defective as scientific expository treatises, was unquestionably very powerfully felt in the increasing respect for these private teachers of justice whose writings breathed the spirit of humanity, justice, peace, and mutual forbearance. Protestant Germany was the field where the mixed science of public law and natural jurisprudence was first cultivated with most success. The scientific writers of that intellectual land had not yet learned to use freely their rich, copious, and expressive tongue. They wrote in the dead language of Rome to instruct the living men of their own age and country. In Germany more than any other country, scientific and active life stood, as they still stand, detached from each other like two separate worlds. Their mutual intercourse was kept up at this

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<sup>u</sup> Leibnitz, Opera, tom. iv. 275, edit. Dutens.

period through the medium of the learned language common to both. Thomasius first used the German for instruction in public lectures, and Leibnitz the French for philosophical discussions.

Leibnitz, so justly compared by Gibbon to those conquerors whose empire has been lost in the ambition of universal conquest, comprised both the philosophy of jurisprudence and the details of practical law within the vast circle of his attainments. Yet he left no great complete work on these subjects, and his views respecting them are to be found scattered in his correspondence and other publications. His views of the true principles on which the law of nature and nations ought to be founded are very concisely stated in the preface to his Collection of Treaties published in 1693. "Right" says he "is moral power; obligation moral necessity. By *moral* power, I understand that which with a good man prevails as much as if it were physical. A *good man* is he who loves all men so far as reason allows. Justice, therefore, which rules that affection which the Greeks term *Philanthropy*, may be appropriately called the benevolence of a wise man. Wisdom is the science of happiness. From this fountain flows the law of nature, of which there are three grades; strict law, or commutative justice; equity, or distributive justice; and piety, probity, or universal justice. Besides the rules of justice flowing from this divine fountain called the Natural Law, there is a *voluntary* law established by usage or by the command of a superior. Thus within a commonwealth the civil law receives its sanction from the supreme power of the state; without the commonwealth *the voluntary law of nations is established by the tacit consent of nations*. Not that it is necessarily the law of all nations and of all ages, since the Europeans and the Indians often differ in their notions of International Law; and even among us it may be changed by the lapse of time, of which there are numerous examples. The basis of international law is the law of nature itself, --

§ 6. Leibnitz,  
b. 1646, d.  
1716.



*to which various modifications have been superadded at different times and places.”<sup>v</sup>*

§ 7. Spinoza  
b. 1632—d.  
1677.

Spinoza adopted maxims very different from the mild and beneficent principles of Leibnitz. He agrees with Hobbes that the natural state is a state of war; that all men have a natural right to all things; and that every independent community has a right to do whatever it pleases to other commonwealths, they living in a condition of perpetual war. He even avows the absurd and detestable maxim that nations are not bound to observe their treaties longer than the interest or danger which formed the treaties continues.<sup>w</sup>

§ 8. Zouch,  
b. 1590—d.  
1660.

Dr Zouch, an eminent English civilian, professor of the Roman law at the university of Oxford and judge of the High Court of Admiralty published about two years after

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<sup>v</sup> Leibnitz, *Præfat*, *Cod. Jur. Gent. Diplom.*

<sup>w</sup> Si altera civitas bellum inferre et extrema adhibere media velit, quo eam sui juris faciat, id de jure tentare licet; quandoquidem ut bellum geratur, ei sufficit, ejus rei habere voluntatem. Ac de pace nihil statuere potest nisi connivente alterius civitatis voluntate. Ex quo sequitur, jura belli uniuscujusque civitatis esse, pacis autem non unius, sed duarum minimum civitatum esse jura, quæ propterea confœderata dicuntur. Hoc fœdus tam diu fixum manet, quamdiu causa fœderis pangendi, nempe metus damni, seu lucri spes, in medio est; hoc autem aut illo civitatum alteratri adempto manet ipsa sui juris, et vinculum, quo civitates invicem adstrictæ erant, sponte solvitur, ac proinde unicuique civitati jus integrum est solvendi fœdus, quodcumque vult, nec dici potest, quod dolo vel perfidia agat, propterea quod fidem solvit, simul atque metus vel spei causa sublata est. Si quæ ergo civitas se deceptum esse queritur, ea sane non confœderatæ civitatis fidem, sed suam tantummodo stultitiam damnare potest, quod scilicet salutem suam alteri,—qui sui juris, et cui sui imperii salus summa lex est, crediderit. Ceterum fides, quam sana ratio et religio servandam docet, hic minime tollitur. Nam cum scriptura non nisi in genere doceat fidem servare, et casus singulares, qui excipiendi sunt, uniuscujusque judicio relinquat, nihil ergo docet, quod iis, quæ modo ostendimus, repugnat. (Spinoza *Tract. Theol. Polit. cap. iii.*)

This is the very counterpart of Machiavelli's maxim that “a prudent prince will not, and ought not to observe his engagements when it would operate to his disadvantage and the causes no longer exist which induced him to make them.” (*Il Principe*, cap. xviii.)

the peace of Westphalia a compendium of the science which the writings of Grotius had contributed to render so popular among European statesmen and scholars. This little work entitled *Juris et Judicii fecialis sive Juris inter Gentes et Quæstionum de eodem Explicatio*, abridged from Grotius with apt illustrations principally taken from Roman law and Roman history, would not deserve special notice among the innumerable writings of the public jurists, were it not for the more characteristic designation first given by the author to that rule which governs, or ought to govern, the intercourse of independent communities. This rule he calls *Jus inter Gentes* to distinguish it from the *Jus Gentium* of the Roman lawyers, who applied that term to what in modern times has been called natural law, being that rule of conduct prescribed by God the author of nature to all his rational creatures. This new term of *Droit entre les Gens* was afterwards adopted by Chancellor D'Aguesseau, (*Oeuvres*, tom. iv. p. 267,) and has since been converted into the term *Droit International* (International law) as adapted "to express in a more significant way, that branch of law which commonly goes under the name of *law of nations*; an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence."<sup>x</sup>

Zouch makes the same distinction as Grotius between the natural law and the law obtaining between nations, the first being a sound deduction from the principles of natural justice, the latter from general consent established by the general usage of nations. "The law *between* nations," says he, "is that which among the Romans received the special denomination of *Jus Feciale*, a knowledge of which Cicero calls *præstabilem scientiam*, quæ in conditionibus regum, populorum, externarumque nationum, in omni denique jure

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<sup>x</sup> Bentham, *Morals and Legislation*, Works, Part i. p. 149. Note, Bowring's edition.

pacis et belli versatur.<sup>7</sup> The college of fecial heralds, (as Dionysius Halicarnassensis informs us,) was instituted by Numa Pompilius, and it was their duty to take cognizance of pacts, leagues, public injuries sustained from allies and others, the mission of ambassadors, the renouncing of friendship, declarations of war, and to execute what was decreed. The books concerning this law have perished. Its vestiges may, however, still be traced in the sacred scriptures, in the pandects and code of the Roman jurisprudence, in Greek and Latin authors from whose opinions and testimonies we may learn what has been generally received according to natural reason and according to the usage of nations; because" (in the very words of Grotius,) "where many minds of different ages and countries concur in the same sentiment it must be referred to a general cause, which in the present subject can be no other than a just deduction from the principles of natural justice or universal consent. The first discovers to us the natural law, the second the law of nations. But besides the general customs and usages which are received as law between nations, there is also that which arises from the mutual consent of particular nations, as evidenced in pacts, conventions and leagues. As the common consent of the community makes the law for that state, so nations in general, not less than a particular people, are bound by their consent."<sup>8</sup>

The above extract illustrates the general character of this little work. It is international jurisprudence taught by historical examples, with a constant reference to the Roman

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<sup>7</sup> Grotius, and after him Zouch, have mistaken the sense of the above quoted passage from Cicero's magnificent oration *Pro lege Manilia* as referring to the great importance of the science of international law, which in fact only speaks of Pompey's surpassing knowledge of the international relations of Rome and of the laws of peace and war ad præstabilem ejus esse scientiam "(not præstabile esse scientiam) quæ in conditionibus regum, populorum, externarumque nationum, in omni denique jure pacis et belli versatur." (Ompheda, *Litteratur des Völkerrechts*, B'd. i. § 148. .

<sup>8</sup> Zouch, *De Jure inter Gentes*, Pars. i. § 1. No. 1.

civil law, as a sort of universal code, the authority of which was still generally recognized in Europe. Zouch was the successor of Alberico Gentili in the professor's chair of Roman law at Oxford, where that science was taught as preparatory to the admission of advocates in the ecclesiastical and maritime tribunals, whilst those who were destined for the practice of the municipal law were trained in the Inns of Court at London. Zouch was succeeded in the office of judge of the high court of admiralty, by Sir Leoline Jenkins during the reign of Charles II. by whom he was also employed in several important diplomatic missions.

The works of Jenkins contain a collection of official opinions delivered in cases of maritime law arising out of captures by English cruisers whilst England was belligerent, or of the property of English subjects whilst England was neutral.\*

§ 9. Sir Leoline Jenkins, b. 1625, d. 1684.

In the same year with Zouch's work (1650) the learned Selden published his treatise, *de Jure Naturali et Gentium juxta disciplinam Ebraeorum*. This is a work of prodigious erudition respecting the peculiar institutions of the ancient Jews, and the opinions of that remarkable people concerning the *Jus Gentium*, understood in the sense of

§ 10. Selden, b. 1584, d. 1634.

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\* Life of Sir Leoline Jenkins, etc. by W. Wynne, 2 vols. fol. London, 1724.

"When Sir L. Jenkins was judge of the High Court of Admiralty in the latter part of the seventeenth century, it was the practice, sometimes for the king, and at others for the commissioners of appeal, to call for his official opinions in writing, on cases depending in other courts or diplomatically represented to the government. These rescripts are valuable, not only as one of the scattered and scanty materials composing the printed stock of admiralty precedents in Great Britain, but as the testimony of a man who appears to have been not undeservedly regarded as an oracle in his department of law, and to have delivered his opinions with a candour and rectitude the more meritorious, as he served a sovereign who gave little encouragement to these virtues, and as he was himself of a temper sufficiently courtly." (Madison, Examination of the British Doctrine which subjects to capture a Neutral Trade not open in time of Peace, p. 113, London ed. 1806.)

the Roman lawyers, as well as of their usages and practice in the international relations of war and peace. Although published subsequent to the great work of Grotius, it contains no reference to the doctrines of that eminent publicist. Selden divides the law of nations into the *primitive* or natural law of nations, and the *secondary* or that which arises from compact and usage. In his celebrated *Mare Clausum* (1635) written to vindicate the claim of Great Britain to the sovereignty over the seas which surround the British islands in reply to Grotius' *Mare Liberum*, he had stated with more accuracy and precision his notions of this secondary law of nations, which appear from the passage we quote in the margin to identify it with what more modern writers have termed the positive or voluntary law of nations.<sup>b</sup>

§ 11. Samuel Rachel, b. 1628, d. 1691.

Soon after the publication of Puffendorf's treatise *de Jure Naturæ et Gentium*, appeared two dissertations on the subject by Samuel Rachel, professor at the university of Kiel, and subsequently minister of the duke of Holstein Gottorp at the congress of Nimiguen, in which the opinions of Puffendorf respecting the nature and obligation of international law are called in question. The author of this work sets out with affirming, that besides the law of nature binding on all men living in a social state, there are laws of positive institution obligatory between private individuals, between sovereigns and their subjects, and between independent communities. The first constitutes municipal law; the second public law; and the third international law. This last has for its sole foundation the positive consent, express or implied, of different nations, acknowledging no common superior, to observe certain prescribed rules of conduct in their mutual intercourse. The law of

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<sup>b</sup> "Interveniens autem Jus Gentium dicimus, quod non ex communi pluribus imperio, sed interveniente sive pacto sive morum usu natum est, et jus gentium secundarium fere solet indigetari." (Selden, *Mare Clausum*, lib. i. cap. 3.)

nations is a law of positive institution, and must not therefore be confounded with the law of nature. Nor are its sources to be found in the Roman civil law, which is merely the municipal law of a particular nation. According to this writer, the law of nations may be defined as follows: "*Jus gentium est jus plurium liberarum gentium pacto sive placito expresse aut tacite initum; quo utilitatis gratia sibi invicem obligantur.*" It may be divided into the general and particular law of nations, (*jus gentium commune et proprium*). The general law of nations is that which prevails, if not among all, at least among the most civilized nations; the particular law of nations is that which has been established among a limited number of states for their own particular use and benefit. It is founded upon express consent as evidenced in treaties and conventions between particular states, whilst the general law of nations is founded upon tacit consent. This last is an unwritten law (*jus non scriptum*,) deriving its obligatory force, like all unwritten and customary laws, from the long and uniform acquiescence of its subjects.\*

This controversy about the origin and obligation of international law gave rise to two conflicting sects among the German public jurists of the latter part of the seventeenth century. The one, adhering to Puffendorf, denied altogether the existence of any other law of nations than the law of nature applied to independent communities; whilst the latter adopted the doctrine of Rachel, founding the law of nations upon the law of nature as modified by usage and express compact. But it would be an unprofitable task to analyze the various publications on the theory of natural jurisprudence, with which the press of Germany teemed at this period. We shall therefore proceed at once to a review of the more practical questions connected with the maritime law of nations, which gave rise to the most

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\* Sam. Rachel, *De Jure Naturæ et Gentium, Dissertationes duæ*, 1676.

important wars and negotiations, during the latter part of the seventeenth and the beginning of the eighteenth century. The questions agitated during this period are not yet completely settled. They were again renewed towards the end of the eighteenth century, in the discussions relating to the second armed neutrality of the North, and several of them still remain the subject of controversy between the powers of Europe, which have so often changed their systems of maritime legislation, in order to accommodate them to temporary and fluctuating views of policy according to their relative positions as belligerents or neutrals. This circumstance renders necessary a more detailed examination of these questions than we shall be able to bestow upon other parts of our inquiry. A complete analysis of all the controverted questions of international law which have been raised since the peace of Westphalia, and which might contribute to throw some light upon the progress made by the European law of nations since that period, would exceed the limits we have prescribed to ourselves. We shall therefore select among the various matters presented by this vast subject, those which may be considered as most important in their practical application to the mutual relations of states in peace and in war.

§ 12. Maritime law of nations.

The testimony of Grotius and other public jurists of the seventeenth and the earlier part of the eighteenth century, shows that the rules relating to maritime warfare adopted by the Consolato del Mare, as early as the latter part of the fourteenth century, were still recognized in practice by the principal European states, with certain exceptions contained in the ordinances of France and Spain, during the different maritime wars which took place between the peace of the Pyrenees, 1659, and the peace of Utrecht, 1713. These rules, then, may be considered as forming the general maritime law of Christendom, independent of these exceptions, and of others introduced between particular na-

tions by special treaties forming the conventional law between the contracting parties.

During the interval between the peace of Nimiguen, 1678, and the war undertaken by Louis XIV, 1689, to replace James II. on the British throne, the efforts of the French government were directed to develop the maritime resources of France; to encourage her commerce, navigation, and fisheries as the nurseries of seamen; to improve her arsenals, dock yards and schools of naval instruction. With the same view the ancient customs and regulations relating to maritime commerce were embodied in a uniform code by the Marine Ordinance of 1681. This ordinance also contains a complete collection of rules for the government of the commissioned cruizers and of the prize tribunals in cases of maritime captures in war. These were compiled from the ancient French ordinances, beginning with that of Charles VI, anno 1400, down to the more modern edicts of the French kings on the same subject, thus connecting the maritime institutions of the seventeenth century with the ancient laws and customs of the sea, compiled in the fourteenth by the authors of the *Consolato del Mare*. The still more ancient collection called the *Roles d'Oleron* or *Jugemens d'Oleron* has been satisfactorily shown by M. Pardessus not to have been exclusively of English origin, as supposed by Selden and other writers, but to have been compiled at various epochs, including the whole period when the maritime provinces of France, bordering on the English Channel and the Bay of Biscay were under the dominion of the kings of England of the Norman line. This collection also refers to captures at sea, as being from time immemorial within the admiral's jurisdiction, which appears to have been regulated in the same manner in both countries. The marine ordinance of 1681 embodied and gave a more complete sanction to the rules and principles of prize law which had been gradually formed by ancient usages and judicial precedents.

Marine ordinance of Louis XIV, 1681.

When Louis XIV published this beautiful model of



legislation he intended to give laws, not to other nations who were independent of his authority, but to his own subjects, his admiralty judges, and his commissioned cruizers, who were responsible to him as their sovereign for what they did in war under colour of his authority, as he was responsible to foreign states whose subjects might be injured by their misconduct. The usage of nations, which constitutes the law of nations, had not then established, nor has it yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent state refers the jurisdiction over such cases to the courts of admiralty established under its own authority within its own territory, with a final resort to a supreme appellate tribunal under the direct controul of the executive government. The rule, by which the prize courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties, by which their own country is bound to other states. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers, or they may be furnished with a positive rule by their own sovereign in the form of ordinances framed according to what their compilers understand to be the just principles of international law.

§ 13. The-  
ory of prize or-  
dinances.

The theory of these ordinances is well explained by an eminent English civilian of our own times. "When" (says Sir William Grant,) "Louis XIV published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance, the principles of marine law as then understood and received in France. I say, as understood in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of in-

interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was."

The above observations were made by Sir W. Grant in pronouncing the judgment of the Lords of Appeal in Prize and Plantation causes in 1801, upon an incidental question arising in a case of insurance upon a vessel *warranted Swedish property* (Sweden being then neutral in the war between Great Britain and France,) and confiscated by a French tribunal in the Isle of France as enemy's property under the French ordinance of 1778, requiring certain specified proofs of the national character of the officers and crew of the vessel, and certain formal documents as to the proprietary interest in the cargo, for want of which, the vessel and cargo were condemned as prize of war. After stating the alleged ground of condemnation, and making the above observations, the learned judge proceeded to say that "it was truly observed, at the bar in the course of the argument, that it has been made matter of complaint against us, (how justly is another consideration,) that we have no code by which neutrals may learn how they may protect themselves against capture and condemnation. Now this court seems to me in this case to have well and properly understood the effect of their own ordinances. They have not taken them as positive laws binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation."<sup>d</sup>

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<sup>d</sup> Marshall on Insurance, vol. i. p. 425.

The same view is taken by M. Portalis in delivering the *Conclusions* upon which the Council of Prizes at Paris reversed the sentence of condemnation pronounced by the Inferior prize tribunal in the case of the American ship Pigon, upon the ground of the *role d'équipage* required by several ancient and modern French ordinances not being found on board. After premising that all questions of neutrality are, what are termed questions of *bona fides*, he then proceeded to state that neutrality is to be proved, and hence the several regulations in the ordinances of France requiring the neutral character of vessels and their cargoes to be proved by certain enumerated documents among which is mentioned a *rôle d'équipage* in due form. "But it would be an error to suppose that the want of a single one of these papers, or the minutest irregularity in one of them, would be sufficient to pronounce condemnation. Formal papers frequently conceal an enemy interest which is disclosed by other circumstances. On other occasions, the character of neutrality breaks through omissions and irregularities of form arising from mere negligence, and founded upon motives foreign to any fraudulent intention. We must search for the truth, and in these matters as in all others which are regulated, not by unbending forms, but by the principles of good faith, we must say with the law, that mere omissions or mere irregularities of form cannot vitiate if the truth is otherwise apparent, *et si aliquid ex solemnibus deficiat cum æquitas poscit, subviendum est.*"

So also in the case of the American ship Statira, the same learned person observes: "In general, the ordinances provided for regulating maritime captures, and which are improperly called laws, are essentially variable *pro temporibus et causis*, and may be tempered in their application by judicial discretion guided by views of wisdom and equity. I will add that in carrying into execution regulations of extreme severity, we ought rather to restrain than to extend them; and that in seeking for the different interpretations of which they are susceptible, we ought to pre-

fer that which is the most favorable to justice and the freedom of commerce. The principle of law does not arise from the regulations, but the regulation ought rather to be derived from the principle. Consequently the particular laws and regulations ought always to be executed in the manner most conformable to the principles of universal reason; above all in those matters relating to the law of nations, where the legislator has ever contented himself with being the respectful interpreter of universal law."<sup>e</sup>

The marine ordinances of one state may then be considered, not merely as historical evidence of the practice of that state in warfare at sea, but of the cotemporary opinion of its statesmen and jurists as to what was the approved usage of nations at the period when these ordinances were issued.

The compilers of the marine ordinance of Louis XIV adopted the maxim of the *Consolato del Mare*, that the goods of an enemy on board the ship of a friend were liable to capture; whilst they rejected the rule that the goods of a friend on board an enemy's ship were exempt from confiscation. Reversing the latter maxim, they not only declared liable to confiscation as prize of war the goods of a friend found on board an enemy's ship, but involved in the same condemnation the ship of a friend carrying enemy's goods, thus limiting the lawful commerce of a neutral to his own goods carried in his own vessel.<sup>f</sup>

The extreme severity of these regulations makes it necessary to inquire more minutely into the history of the

<sup>e</sup> Conclusions de Portalis relatives à la prise du navire Américain le *Stataira* devant le Conseil des Prises, 6 Thermidor, an. 8, p. 6

<sup>f</sup> Tous navires qui se trouveront chargés d'effets appartenans à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi seront pareillement de bonne prise. (Ordonnance de la Marine, liv. 3, tit. 9, des Prises, art. 7.) The confiscation of enemy's ships had been provided for by the fourth article, and that of enemy's goods was left to be pronounced under the pre-existing law.

manner in which they became incorporated into the prize code of France.

The more ancient ordinances of Francis I, 1543, and of Henry III, 1584, had adopted the maxim laid down by Mornac "*que la robe d'ennemi confisque celui d'ami*," (*Ad. l. penult. § 1, ff. locati conducti*), and accordingly condemned the goods of a friend found on board an enemy's vessel. The contrary had been provided by the declaration of 1650; but the former rule was again revived by the Marine ordinance of Louis XIV, 1681; and continued to be the law of France until the revolution, except so far as it was occasionally suspended in its application to the flags of certain nations by special conventions.

Grotius, writing in 1625, states that "nothing is acquired by the law of war but what belongs to the enemy, and that the property of neutrals is not thus acquired, although it be found in the enemy's territory;" and he infers from thence "that the maxim that goods found on board an enemy's ship are to be considered as belonging to the enemy," is not warranted by the law of nations, but that such are only *presumed* to be enemy's goods until the contrary is proved.<sup>s</sup> He goes on to state that it was so decided in 1438 in the supreme court of Holland, the duke of Burgundy being then at war with the Hanse towns, and that the decision had passed into a law.<sup>h</sup>

As to neutral vessels laden with enemy goods, they were first made liable to confiscation in France by the ordinance of Francis I, 1543, which was revived by the ordinance of

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<sup>s</sup> *Liquet et hoc ut res aliqua nostra belli jure fiat requiri et hostium fuerit, nam quæ res apud hostes quidem sunt, puta in oppidis eorum aut intra præsidia, sed quorum domini nec hostium sint subditi, nec hostilis animi, eæ bello acquiri non possunt. \* \* \* Quare quod dici solet hostiles censi res in hostium navibus repertas, non ita accepi debet quasi certa sit juris gentium lex, sed ut præsumptionem quandam indicet, quæ tamen validè in contrarium probationibus possit elidi.* (Grotius, de J. B. ac P. lib. iii. cap. vi. §§ 5, 6.)

<sup>h</sup> De J. B. ac P. lib. iii. cap. vi. § 6.

Henry III, 1584. The last mentioned ordinance was avowedly issued for the purpose of putting an end to neutral frauds in concealing enemy interests. It seems to have been for a long time doubted whether this regulation did ever, in fact, become the actual law of France; and Sir Leoline Jenkins, judge of the English court of admiralty in the reign of Charles II., having occasion to speak of this article in the case of a ship condemned in France, says of it in ~~1678~~ "There are several things of moment, as I conceive, that may be said to show, that that article ought not obtain in this case: first, that article has been complained of, and written against by public ministers and learned men, upon the first publishing it, as an encroachment and violation of the natural freedom of commerce. The direct contrary has been adjudged in the case of a *free* Hamburger, surprised with unfree goods on board it, by a solemn decision of the parliament of Paris, 1592. And this article was then declared in the sentence itself to be abrogated by disuse, the first publishing thereof being under Francis I, 1543, having never obtained in judicial determination for those forty-nine years, and the design of the first publishing it being only *in terrorem*. It has been moderated with several restrictions by the last and present most Christian kings in their several edicts, viz: Dec. 19, 1639, Jan. 16, 1645, Jan. 21, 1650; and by another ordinance, the 1st of Feb. of the same year, it is expressly provided that in prizes taken and to be taken by French commissions, the goods of enemies only shall be taken and made prize, but the other goods and ships that carry both, if they belong to friends shall be discharged."<sup>i</sup>

Grotius, commenting on this as the existing law of France in his time, holds that it only extends to the case of a neutral ship taking enemy's goods on board *with the knowledge of the owner.*<sup>j</sup>

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<sup>i</sup> Life of Sir L. Jenkins, vol. ii. p. 720.

<sup>j</sup> Sed neque amicorum naves in prædam veniunt ob res hostiles, nisi ex con-

Bynkershoek, whose work on the law of war was published in 1737, but with reference to examples taken from the maritime wars preceding the peace of Utrecht, states that such was the ancient law of France :—and he dissents from the opinion of Grotius that it did not extend further than to the case of a neutral ship the owner of which knowingly receives enemy's goods on board.<sup>k</sup> Be this as it may, it is certain that this law was re-enacted on the revival of the marine ordinances by Louis XIV in 1681; and continued to be observed, except as to the flags of certain nations specially exempted from its operation, until the issuing of the *Réglement* of Louis XV, anno 1744, which condemned the enemy's goods whilst it restored the neutral vessels on board of which they were captured. Valin states that this jurisprudence which prevailed in the French prize courts from 1681 to 1744, was peculiar to them and to the Spanish courts of Admiralty, the usage of other nations being to confiscate the goods of the enemy only.<sup>l</sup> Valin also repudiates the above opinion of Grotius limiting the application of the ordinance to the case where the goods are shipped with the knowledge of the owner. "Grotius," says he "pretends that our ordinances are to be thus understood ;—but the 7th art. of the Ordinance of 1681, no more than the 5th of the *Réglement* of the 23d July, 1704, makes such a distinction, and it would, if admitted, furnish the master with an excuse with the aid of which he would never fail to elude the confiscation of both vessel and cargo."<sup>m</sup>

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sensu id factum sit dominorum navis. Atque ita interpretandas puto leges Gallie, quæ ex rebus naves, ex navibus res prædæ subjiciunt, quales sunt Francisci I. datæ anno c1o1oxLIII. cap. 42. Henrici III. anno c1o1oLXXXIV mense martio, cap. 69. Alioqui res ipsæ solæ in prædam veniunt. (Grotius de J. B. ac P. lib. iii. cap. vi. § 6. in Notia.)

<sup>k</sup> Bynkershoek, Q. J. Pub. lib. i. cap. xiv.

<sup>l</sup> Valin, *Commentaire sur l'Ordonnance de la Marine*, liv. 3, tit. 9, des Prises. art. 7, *Traité des Prises*, ch. 5, § 5, No. 7.

<sup>m</sup> Valin, *Traité des Prises*, ch. 5, § 5, No. 6.

Such was the state of European opinion and practice, independent of conventional law, upon these two questions during the period which elapsed between the peace of Pyrénées and that of Utrecht; France and Spain adhering to the more rigorous rule which the framers of the French ordinances had borrowed from the Roman fiscal law, whilst most other maritime states continued to adopt the maxims of the *Consolato del Mare*.

How far the law of nations in this respect was changed during the same period is the next question.

§ 14. Conventional maritime law of nations.

Here it is proper to observe that whether the stipulations in any particular treaty are to be considered as *declaratory* of the pre-existing law of nations, or merely as forming a special exception relaxing the primitive rigour of the consuetudinary law between the contracting parties, depends not merely upon the literal interpretation of the words of the treaty itself, but upon a view of all the extrinsic circumstances which may be supposed to have determined the assent of the parties. "Whether the stipulations of a treaty are to be considered as declaratory of the law of nations, or as an exception to it is a question," says Bynkershoek, speaking of another subject, "which it is often difficult to decide, and it is always dangerous to infer the law of nations without also consulting reason."<sup>a</sup> In another place, speaking of contraband of war, he says: "The law of nations on this subject is not to be drawn from any other source than reason and usage. Reason commands me to be equally friendly to two of my friends, who are enemies to each other; and hence it follows that I am not to prefer either in war. Usage is pointed out by the constant, and as it were, perpetual custom which sovereigns have follow-

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<sup>a</sup> Sed recte observat Zouchens non satis constare, an quod illi pacti sunt, sit habendum pro jure publico, an pro exceptione, qua a jure publico diversi abeunt. In variis pactis, et antiquioribus et recentioribus, id adeo sæpe est incertum, ut ex solis pactis, non consulta ratione, de jure gentium pronunciare periculosum sit. (Bynkershoek, Q. T. Pub. lib. i. cap. xv.)



ed in making treaties and laws upon this subject ; for they have often made such regulation by treaties to be carried into effect in case of war, and by laws enacted after the war begun. I have said *by, as it were, a perpetual custom*, because one or perhaps two treaties, which vary from the general usage, do not alter the law of nations.”<sup>o</sup>

In speaking of this particular subject, he states “ that the treaties respecting it have adopted the principle of the old French law, which confiscates the goods of neutrals merely because they are found on board the vessels of an enemy,<sup>p</sup> and therefore do not agree with what Grotius states to have been decided by the Court of Holland, and to have obtained the force of a law. It is true that the treaties which I have cited are subsequent, and that they are of no force except between those who are parties to them. But the rule which they establish cannot be defended on rational principles : for why should I not be allowed to make use of my friend’s ship to carry my property, notwithstanding his being at war with you ? If treaties do not prohibit, I am at liberty, as I have already said, to trade with your enemy ; and if so, I may likewise enter into any kind of contract with him, buy, sell, let, hire, etc. Therefore, if I have engaged his vessel and his labour, to carry my goods across the seas, I have done that which was lawful on every principle. You, as his enemy, may take and confiscate his ship, but by what law will you also take and confiscate the goods that belong to me who am your friend ?

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<sup>o</sup> *Jus gentium commune in hanc rem non aliunde licet dicere, quam ex ratione et usu. Ratio jubet ut duobus, invicem hostibus, sed mihi amicis, æque amicus sim, et inde efficitur, ne in causa belli alterum alteri præferam. Usus intelligitur ex perpetua quodammodo paciscendi edicendique consuetudine : pactis enim Principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Dixi, ex perpetua quodammodo consuetudine, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat. (Q. T. Pub. lib. i. cap. x.)*

<sup>p</sup> But by the same treaties, as Bynkershoek subsequently shows, this is coupled with the correlative maxim of free ships free goods.

All that I am bound to do is to prove that they are really mine ; but here I agree with Grotius that there is some reason for *presuming* that goods found on board of an enemy's vessel are the property of the enemy."<sup>1</sup>

In the next chapter (XIV.) he proceeds to state that, " If a neutral ship be taken, having enemy's property on board, two questions are to be considered : the one, whether the neutral ship itself, the other, whether the enemy's goods are liable to confiscation ?

" As to the first question," says he, " if we follow the ancient law of France, a neutral ship will be liable to confiscation for carrying enemy's goods. That such was the law of France in ancient times is clear by the exemption from it granted to the Hanse towns in their treaty with that country of the 10th May, 1655." After refuting the opinion of Grotius founded upon that of Paulus, (ff. *de Public. et Vectig.* l. ii. § 2,) which makes the confiscation to depend upon the knowledge or ignorance of the owner, he proceeds : " But now let us pause and consider whether he is guilty of any offence against the law of nations, who carries on board of his vessel the goods of his friend, although that friend is your enemy ? By what right will you, who are my friend, capture my ship, merely because she carries your enemy's goods ? I, who am a friend to both parties, shall serve them both in those things that are not hurtful to either, and in the same manner both will serve me in things that are indifferent. On this principle your enemy may with propriety hire his vessel out to me, and I am at liberty

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<sup>1</sup> Q. J. Pub. lib. i. cap. xiii. The treaties cited by Bynkershoek, which adopted the associated maxims of free ships free goods, and enemy ships enemy goods, are the marine treaty between Spain and the States General, 1650, art. 13. Treaty of commerce between France and the States General of 1662, art. 35. Treaty between the same powers of 1678, art. 22 ; of 1697, art. 27 ; of 1713, art. 26. Between England and the States General of 1674, art. 8 ; Sweden and the States General, 1675, art. 3 ; and of 1679, art. 22.

to hire mine out to him. Of those who act thus innocently, and without fraud, I have treated more at large in the preceding chapter, and if what I have there said is correct, there is no need of saying any more upon this question, but it must be laid down as a principle that a neutral vessel is not liable to be confiscated for having enemy's goods on board, whether the owner knew it or not ; because in either case he knew that he was engaged in a lawful trade ; and this case differs from that of him who knowingly carries *contraband* goods to the enemy. Wherefore, on the present occasion, I do not admit the application of the distinction made by *Paulus* ; but I approve of the opinion which was given in general terms by the Dutch civilians, and is recorded in the *Consilia Belgica*, (vol. 4, Consil. 206, n. 2,) *that a neutral ship, although laden with enemy's goods, is not liable to confiscation.*

“ We will now proceed to consider the second question, whether the enemy's goods themselves, taken on board of a neutral vessel are liable to confiscation ? Some will wonder, perhaps, that any doubt should be entertained about it, as it is clearly lawful for a belligerent to take the property of his enemy. And yet in all the treaties which I have cited in the preceding chapter, there is an express stipulation that enemy's goods found on board of neutral vessels shall be free, or as we express it in our vernacular Dutch, *vry schip, vry goed*, except, however, *contraband* of war when being carried to the enemy. And what will be thought more astonishing is, that among these treaties there are four to which *France* is a party, and according to them even *enemy's goods* laden on board of neutral vessels are not liable to confiscation ; much less, therefore, ought the *neutral vessel* to be confiscated on board of which they are shipped. So it must be said either that the principle of the old *French* law which I have above mentioned has been entirely abandoned, or, what is more probable, that those treaties are to be considered as exceptions to it. However this may be, we are bound in the discussion of general

principles, to attend more to reason than to treaties. And on rational grounds, I cannot see why it should not be lawful to take enemy's goods, although found on board of a neutral ship; for in that case, what the belligerent takes is still the property of his enemy, and by the laws of war belongs to the captor.

"It will be said, perhaps, that a belligerent may not lawfully take his enemy's goods on board of a neutral vessel, unless he should first take the neutral vessel itself; that he cannot do this without committing an act of violence upon his friend, in order to come at the property of his enemy, and that it is quite as unlawful as if he were to attack that enemy in a neutral port, or to commit depredations in the *territory* of a friend. But it ought to be observed, that it is lawful to detain a neutral vessel, in order to ascertain not by the flag merely, which may be fraudulently assumed, but by the documents themselves which are on board whether she is really neutral. If she appear to be such, then she is to be dismissed, otherwise, she may be captured. And if this is lawful, as on every principle it is, and as it is generally practiced, it will be lawful also to examine the documents which concern the cargo; and from thence to learn whether there are enemy's goods concealed on board, and if any should be found, why may they not be captured by the law of war? The Dutch civilians, whose opinion I have already cited, and the *Consolato del Mare* in the chapter above referred to, are equally clear upon this point. According to them, the neutral ship is to be released; but the enemy's goods are to be carried into a port of the captor, and there condemned."<sup>r</sup>

The earliest example of a relaxation of this rule of the *Consolato del Mare* is that contained in the Capitulation granted by the Sublime Porte to Henry IV. of France, in 1604, by which the Porte consented that the French flag

Relaxation of the primitive law by the capitulation of the Sublime Porte with Henry IV. of France, 1604.

<sup>r</sup> Q. J. Pub. lib. i. cap. xiv.

should protect the goods and effects of enemies from seizure. This capitulation was subsequently made the basis of various treaties between Turkey and the different maritime states of Christendom, and between the latter and the Barbary powers, by which the maxim of free ships free goods was mutually adopted, and the flag and pass were made conclusive of the national character of the vessel.\*

Treaty of the  
Pyrénées,  
1659.

The treaties of peace of Westphalia, 1648, having mainly a reference to the territorial and other arrangements growing out of the thirty years war in Germany, the contest between France and the house of Austria, and the long and bloody struggle between Spain and Holland, contain no stipulations on these contested points of the maritime law of nations. But by the treaty of the Pyrénées, 1659, by which the war between the great maritime powers of France and Spain was terminated, it was stipulated, that if either of the parties should be engaged in war with a third party, whilst the other remained neutral, the goods of the enemy laden in the ships of the neutral should be free, whilst the goods of the neutral laden in the ships of an enemy should be liable to capture and confiscation. That this article was merely intended to introduce a new law between the parties, as respects the freedom of enemy's

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\* Flaaan, *Diplomatie Française*, tom. i. p. 225. M. Flaaan says: "C'est à tort que l'on a donné à ces capitulations de 1604 le nom de *traité*, lequel suppose deux parties contractantes stipulant sur leurs intérêts; ici on ne trouve que des concessions, des privilèges et des exemptions de pure libéralité faite par la Porte à la France." (Ib. p. 227, n. 1.)

The third article of this Capitulation declared: "Que les Vénitiens, Anglois, Espagnols, Catalans, Ragusais, Génois, Napolitains, Florentins, et généralement toute autre nation, pourroit traffiquer dans les Etats du grand seigneur, sous la bannière de France; que les ambassadeurs d'Angleterre et d'autres ne pourroient les en empêcher; et que cela dureroit tant que l'Empereur de France conserveroit son alliance."

The twelfth article is as follows: "Voulons et commandons que les marchandises qui seront chargées à nolis sur vaisseaux Français, appartenant aux ennemis de notre Porte, ne puissent être prises sous couleur qu'elles sont de nos dits ennemis, puisq' ainsi est notre vouloir."

goods in a neutral ship, which it coupled with the old law of France and Spain that enemy's ships should make enemy's goods, will be evident from the fact that the latter power subsequently transplanted into its own prize code the French regulation by which a neutral vessel carrying enemy's goods was liable to confiscation together with the goods, and that this rule was afterwards constantly enforced both by France and Spain against other nations.<sup>†</sup>

The principal treaties by which Great Britain had conceded the principle of free ships free goods, previous to the peace of Utrecht, were the treaty between Portugal and the English commonwealth of 1654, art. 23; that between Great Britain and France of 1677, art. 8; and the treaties between Great Britain and Holland of 1668, and 1674. The treaty of 1667, between Great Britain and Spain, which has been sometimes supposed to contain the same concession, evidently refers merely to the general right of neutrals to trade with the enemy, which is now considered incontestible, but which had been frequently drawn in question during the maritime wars of the seventeenth century.<sup>‡</sup>

Treaties between G. Britain and other Powers, conceding the principle of free ships, free goods.

The aid and assistance contributed by Charles I. to the house of Braganza in the first revolt of Portugal against Philip II. in 1640, were continued by Cromwell under the English commonwealth, until that intimate alliance between Great Britain and Portugal was gradually formed which has subsisted until the present times. In 1654, a treaty of navigation and commerce was concluded between the two countries, by which the most extensive privileges were conferred on British merchants residing and trading in Portugal. By the same treaty, the principle of free ships free goods was adopted between the contracting parties, coupled with the correlative maxim of enemy ships enemy goods. This

<sup>†</sup> Valin, *Traité des Prises*, ch. 5, § 5, No. 1.

<sup>‡</sup> Jenkinson, (Lord Liverpool,) *Discourse on the Conduct of Great Britain in respect to Neutral Nations*, p. 48, edit. 1801.

stipulation continued to form the conventional law between the two nations until the revision of the treaty in 1810, when the stipulation in question was omitted.\*

In 1677, Charles II being secretly allied with Louis XIV, whilst the latter was openly at war with Holland, a treaty of navigation and commerce was concluded at St. Germain between Great Britain and France, by which the two maxims of free ships free goods, and enemy ships enemy goods, were adopted by the contracting parties. The motive for this stipulation, on the part of England, was to secure her trade with Holland and other countries from depredation by French cruizers, whilst the assent of France to this deviation from her ordinary prize law was secured by the admission of French manufactures into England.†

Treaties between Holland and other Powers.

During the period which elapsed between the peace of Westphalia, by which the independence of the United Provinces was finally acknowledged by Spain, and that of Utrecht, by which it was secured against France, the external policy of that republic fluctuated between the two great objects of maintaining the equilibrium of Europe, as the only security for her national existence,—and that of promoting the interests of her commerce, colonies, navigation and fisheries, as the main foundations of her national wealth, strength, and prosperity. The interests of Holland, both as a belligerent and a neutral power, induced her to seek the establishment of the principle of free ships free goods as the general law, by which she would gain more whilst others were engaged in war and the Republic should remain neutral, than she would lose when this state of things was reversed. This principle was first conceded by England to Holland by the treaty of commerce concluded at the Hague in 1668, as the price of an alliance between the

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\* Schoell, *Histoire abrégée des Traités de Paix*. tom. x. p. 45.

† Flissan, *Histoire de la Diplomatie Française*, tom. iii. p. 423.

two countries against France.\* It was again renewed in the treaty of commerce concluded in 1674, and continued to form the rule observed between the two countries until the war of 1756 broke out between France and Great Britain, when the refusal of Holland to fulfil the stipulations contained in the treaties of defensive alliance and guaranty between the republic and the British crown induced the latter to refuse any longer to recognize the principle.†

The navigation act, passed by the English parliament under the commonwealth in 1651, and afterwards renewed in the reign of Charles II, was designed to secure to British shipping a portion of the carrying trade which had been hitherto monopolized by Holland. Her great minister John De Witt sought to parry the fatal blow, thus aimed at the commerce and navigation of his country, by inducing France to relax the severe rules of her prize code, and adopt his favorite maxim of free ships free goods. The states general had obtained as early as 1646 a temporary suspension of the ancient French ordinances, by which a neutral ship carrying enemy's goods was made liable to confiscation together with a recognition of the rule of free ships free goods. This latter stipulation not having been duly observed on the part of France gave rise to remonstrances from the Dutch.‡ The Dutch negotiator in Paris, in his correspondence with De Witt, states that he obtained in 1658 "the repeal of the pretended French law, *que la robe d'ennemi confisque celui d'ami* ; so that if for the future there should be found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be

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\* The Dutch minister De Witt absolutely refused to sign the treaty of defensive alliance, unless it was preceded by a promise on the part of Sir W. Temple the British negotiator to conclude a treaty of commerce containing the concession. (Sir W. Temple's Letters to Lord Arlington, Feb. 12, 1668, Jan. 24, 1668. Temple's Works, vol. i. p. 317.)

† Jenkinson, Discourse, etc. pp. 67-73. ed. 1801.

‡ Lettres et Negotiations de Jean de Witt, tom. i. p. 108.



confiscable, and the ship with the other goods will be restored ; for it is impossible to obtain the 24th article of my instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy."<sup>a</sup> This concession was at last obtained by the commercial treaty between France and Holland signed at the same time with the peace of Nimiguen in 1678, confirmed by the treaty of Ryswick, 1697, which finally established the rule of free ships free goods, and enemy ships enemy goods, between the two powers.<sup>b</sup>

Treaties between France and other Powers.

In 1655 a treaty of navigation and commerce was concluded between France and the Hanseatic towns, by which the ancient privileges accorded to the Teutonic Hanse were renewed and confirmed. The third article provided *que la robe de l'ennemi ne confisquoit pas la robe de l'ami* ; that the goods belonging the inhabitants of the Hanseatic towns found in the ships of an enemy should be free, as well as enemy's goods found in a Hanseatic vessel, except contraband of war, or in case of spoliation of papers or resistance to visitation and search.<sup>c</sup> This concession was revoked by the treaty between France and the Hanseatic towns in 1716, which again rendered liable to capture enemy goods in neutral vessels, exempting the vessels only from confiscation.<sup>d</sup>

The two maxims of free ships free goods, and enemy ships enemy goods, were recognized in the treaty of commerce between France and Denmark of 1663, art. 27 ; and of alliance with Sweden of 1672, art. 19.<sup>e</sup>

Treaties of the Baltic Powers between themselves and with others.

By the treaty of 1670, art. 20, between Sweden and Denmark the ancient rule of the *Consolato del Mare* is

<sup>a</sup> Dumont, Corps diplomatique, tom. vi. p. 1. p. 342. Robinson's Collee-tanea Maritima, p. 121, note.

<sup>b</sup> Flassan, Histoire de la Diplomatie Française, tom. iii. p. 451.

<sup>c</sup> Flassan, Histoire de la Diplomatie Française, tom. iii. p. 194.

<sup>d</sup> Dumont, Corps diplomatique, tom. viii. p. i. p. 478.

<sup>e</sup> Flassan, Histoire de la Diplomatie Française, tom. iii. p. 395.

adopted, by which the goods of a neutral found on board of an enemy ship are declared free, and those of an enemy on board of a neutral ship are subjected to capture and confiscation.<sup>f</sup> The same maxims are adopted by the treaties between England and Sweden of 1661, 1666, and 1670; and between England and Denmark of 1670, art. 20.<sup>g</sup>

Such was the state of the conventional law between the four great maritime powers of France, Spain, Great Britain and Holland, and between them and the Baltic States, when the treaties of Utrecht, 1713, were concluded between the former and the other principal European powers. The main object of the long war which was terminated by the peace of Utrecht, had been the disputed succession to the dominions of the Spanish monarchy; and the principal object of the treaties of peace, was the regulation of that succession, and other territorial arrangements, consistently with the maintenance of the balance of power in Europe. The treaties of peace signed at Utrecht were immediately followed by separate treaties of navigation and commerce between France and Great Britain, between Great Britain and Holland, and between France and Holland, in which the two maxims of free ships free goods, and enemy ships enemy goods were adopted as between these powers. The

Treaties of  
commerce at  
Utrecht, 1713.

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<sup>f</sup> Dumont, *Corps diplomatique*, tom. vii. p. i. p. 132.

<sup>g</sup> Martens, *Manuel Diplomatique sur le dernier état de la controverse concernant les Droits des Neutres sur Mer*, pp. 43, 60, 62. The Baltic powers first adopted the rule of *free ships free goods*, among themselves, by the treaty of armed neutrality of 1780. The Danish Ordinance of 1659, prescribes a form of certificate for goods laden on board of vessels the property of Danish subjects, "that the goods also belong to Danish subjects," a precaution which would have been needless if the vessel protected the cargo. It adopts also the rule of the French prize code *enemy ships enemy goods*, and confiscates neutral ships laden with the goods of an enemy. (Heineccius de Navib. Ob. Vect. Merc. Vetit. Comm. cap. ii, § viii.) By the Swedish Ordinance of 1715, enemy's goods in whatever ships taken, are confiscated as well as neutral goods in enemy's ships. (Robinson's *Collectanea Maritima*, p. 171.)

treaty of peace signed at Utrecht between Great Britain and Spain on the 13th July, 1713, was also followed by a treaty of commerce concluded the 28th November, (9th December,) 1713, between these two powers. Both these treaties are equally silent upon the present question.<sup>h</sup>

§ 15 Contraband of war.

Certain articles, which under the denomination of contraband of war, are forbidden by the law of nations from being carried by neutrals to the enemy, are excepted from the general freedom of neutral commerce stipulated by the above mentioned treaties, beginning with that of the Pyrénées, and ending with the treaties of Utrecht. These treaties at the same time limit the list of contraband to those articles which are directly useful as instruments of war, expressly excluding provisions, naval stores, and all other goods which have not been worked into the form of warlike instruments.

Change in the law of convention and usage by which naval stores became contraband at the beginning of the 18th century.

The Marine Ordinance of Louis XIV, of 1681, confiscates only munitions of war.<sup>i</sup> Valin and Pothier, in commenting upon this article, both concur in declaring that provisions, *munitions de bouche*, were not at the time when they wrote, considered as contraband by the prize law of France, or by the common law of nations, unless destined to a besieged or blockaded place.<sup>k</sup> But Valin states that in the war of 1700, (which was that of the Spanish succession terminated by the peace of Utrecht,) "pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board of Swedish vessels being of the growth and produce of their

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<sup>h</sup> Schoell, *Histoire abrégée des traités de paix*, tom. iv. pp. 21—25.

<sup>i</sup> Les armes, poudres, boulets et autres munitions de guerre même les chevaux et équipages qui seront transportés pour le service de nos ennemis, seront confisqués en quelque vaisseau qu'ils soient trouvés, et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés. (Ordonnance de la Marine, liv. 3, tit. 9, des prises, art. 11.)

<sup>k</sup> Valin, *Commentaire sur l'Ordonnance*, liv. 3, tit. 9, des Prises, art. 11. *Traité des Prises*, ch. 5, § 6, No. 4. Pothier, *Traité de Propriété*, No. 104.

country. In the treaty of commerce concluded with Denmark in 1742, pitch and tar were also declared contraband, together with rosin, sail cloth, hemp, and cordage, masts, and ship timber. Thus, as to this matter there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, *which was not the case formerly*, as appears by ancient treaties, particularly that of St. Germain concluded with England in 1677; the fourth article of which expressly provides that the trade in all these goods shall remain free, as well as in every thing relating to human nourishment, with the exception of places besieged or blockaded."<sup>1</sup>

In order to determine whether such a revolution in the law of contraband really took place in the beginning of the eighteenth century, as is supposed by Valin, we must recur to the preëxisting law on this subject as recognized by the earlier public jurists. Grotius, whose writings exercised an influence so powerful on the usage and opinions of the age succeeding that in which he wrote, in treating of this question, distinguishes between those things that are useful for the purposes of war, those which are not so, and those which may be used indiscriminately in war and in peace, such as money, provisions, and naval stores. The *first* he prohibits neutrals from carrying to the enemy; the *second* he permits; the *third* he sometimes prohibits and sometimes permits according to the circumstances of the war. "For if I cannot defend myself without seizing articles of this nature which are being sent to my enemy, necessity gives me the right to seize them, as we have already explained elsewhere, under the obligation of restoring them, unless there be some *other reason* supervening to prevent me." This *other reason* "*causa alia*," is after-

Law of contraband according to Grotius.

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<sup>1</sup> Valin, *ib.*

wards explained by an example "as if I besieged a town if I held a port in a state of blockade, and the enemy was on the point of surrendering, or of making peace," &c.<sup>m</sup>

The opinion of Grotius as to the *third* class of commodities does not appear to consider them as contraband, but proceeds upon the ground of pure necessity on the part of the capturing belligerent. He does not state the seizure to be lawful on account of any supposed illegal conduct in the neutral in attempting to carry articles of promiscuous use, *not bound to a port besieged or blockaded*, when the seizure is made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity which breaks down the distinctions of property, and revives upon certain conditions the original right of using things as if they were in common. This necessity he had previously explained in his second book, (cap. ii. § vi,) and in the above recited passage he refers expressly to that explanation. In sections 7, 8 and 9, (lib. ii. cap. ii.) he lays down the conditions annexed to this right of necessity, 1. It shall not be exercised until all other possible means have been used. 2. Nor if the right owner is under a like necessity. 3. Restitution shall be made as soon as possible. In his third book, recapitulating what he had before said, Grotius fur-

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<sup>m</sup> In tertio illo genere usus ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi *causa alis* accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causa queri poterit. Si damnum nondum dederit sed dare voluerit, jus erit rerum retentione eam cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. (Grotius, de Jure B. ac P. l. b. iii. cap. i § v. no. 3, 5, 6, 7.)

ther explains this doctrine of necessity, and confirms the interpretation we have put upon the above texts, showing that, with the exception of a place actually besieged or blockaded, they merely refer to such a necessity as exempts from all general rules.

Bynkershoek, in commenting upon the above passage of Grotius, evidently understands it as permitting the seizure of things of promiscuous use, in case of such necessity only, and then under the obligation of restitution. He states that the usage of nations, both as deduced from treaties to be carried into effect in case of war, and from ordinances enacted during war, in general prohibited as contraband only such commodities as are exclusively useful for the purposes of war. He concludes that the materials out of which contraband articles are formed are not contraband. "If," says he, "all materials are prohibited out of which something may be made which is fit for war, the catalogue of contraband goods will be immense; for there is hardly any kind of material out of which something, at least, fit for war, may not be fabricated. The interdiction of these amounts to a total prohibition of commerce, and might as well be so expressed and understood." He qualifies this general position by stating that it may sometimes happen that materials for ship building are prohibited "if the enemy is in great need of them, and cannot well carry on the war without them." On this ground he justifies the edict of the States General of 1657, and that of 1652 against the English, as exceptions to the general rule that materials for naval construction are not contraband.<sup>a</sup> He also states that "provisions are often excepted" from the general freedom of neutral commerce "when the enemies are besieged by our friends or are *otherwise* pressed by famine."<sup>o</sup>

Opinion of  
Bynkershoek.

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<sup>a</sup> Bynkershoek, Q. T. Pub. lib. i. cap. x.

<sup>o</sup> Bynkershoek, Q. T. Pub. lib. i. cap. ix.

Of Heineccius.

Heineccius, writing about the same time with Bynkershoek, states that the contemporaneous usage of nations, as proved by treaties, included in the list of contraband, not only munitions of war, but naval stores and provisions. He seems to place the right of intercepting these latter articles upon the same ground of necessity with Grotius.<sup>p</sup>

Of Zouch.

Zouch, who is quoted by Heineccius, and who wrote in the middle of the seventeenth century, merely copies with a slight variation the above passage from Grotius on the subject of articles of promiscuous use, which he agrees with him in authorizing to be seized on the same ground of necessity.<sup>q</sup> Whilst, on the other hand, Sir Leoline Jenkins, writing in 1674 to king Charles II, respecting the case of a Swedish vessel laden with naval stores, states, that it was "not probable that Sweden hath suffered or allowed in any treaty of theirs with Spain, that their own native commodities should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law than by the general law of nations; and then I am humbly of opinion that nothing ought to be judged contraband by that law in this case, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with."<sup>r</sup>

The only fair inference from the preceding authorities would seem to be that the alteration in the law of contraband, as asserted by belligerents, of which Valin speaks, had already taken place long before the period he assigns to it, but the authority of the new rule thus introduced was

<sup>p</sup> Heineccius, de Nav. ob Vect. Merc. Vetit. Comm. cap. i. § xiv.

<sup>q</sup> Zouch, Jur. et Jud. Feialis, pars ii. § viii. No. 7. *Aliæ sunt quæ in bello vel extra bellum usum habent, ut pecuniæ, commeatum, naves, quas etiam, si earum subvectio deditioem, quæ expectatur, impediri poterit, interceptare licet.*

*Life and Correspondence of Sir L. Jenkins, tom. ii. p. 751.*

still contested by those neutral states whose interests were affected by the prohibition of their accustomed trade in their native productions. This was more especially the case with the Baltic powers as to naval stores.\*

In the famous case of the Swedish convoy determined in the English court of admiralty in 1799, Sir William Scott states "that tar, pitch, and hemp, going to the enemy's use are liable to be seized as contraband in their own nature, cannot, I conceive be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a *disputable nature*, and perhaps continued so at the time of making that treaty," (i. e. the treaty of 1661 between Great Britain and Sweden which was still in force when he was speaking,) "or at least at the time of making *that* treaty which is the basis of it, I mean the treaty in which Whitlock was employed in the year 1656: for I conceive that *Valin* expresses the truth of this matter when he says: '*De droit ces choses,*' (speaking of naval stores,) '*sont de contrebande aujourd'hui et depuis le commencement de ce siècle, ce qui n'étoit pas autre fois néanmoins;*' and *Vattel* the best recent writer upon these matters, explicitly admits amongst positive contraband, '*les bois et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.*' Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain by a noble Lord (Mansfield) then secretary of state, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion that although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was con-

Of Sir W. Scott, in the case of the Swedish convoy.

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\* See the negotiations between Cromwell and the Swedes in 1656, (Whitlock's *Memoirs*, 625—638,) and between the Dutch and the Swedes, (Thurloe's *State Papers*, vol. iv. p. 589.)



structed and therefore a discreet silence concerning them was observed in the composition of that treaty and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe has given upon this subject would in some degree affect and apply what the treaties had been content to leave on that indefinite and disputable footing, on which the notions then more generally prevailing in Europe had placed it.”<sup>t</sup>

It is difficult to read the treaties of 1656, 1661, 1661, 1664, and 1665 between Great Britain and Sweden, as fairly admitting the interpretation placed upon them by the English court of admiralty in the above judgment. They all enumerate coined money, provisions, and munitions of war as contraband between the contracting parties, and the “discreet silence,” referred to by Sir W. Scott, is sufficiently supplied by the treaties of 1664 and 1665, which expressly declare that “where one of the parties shall find itself at war, commerce and navigation shall be free for the subjects of that power which shall not have taken any part in it, with the enemies of the other; and that they shall consequently be at liberty to carry to them directly all the articles which are not specially excepted by the eleventh article of the treaty concluded at London in 1661, nor by virtue of this same article expressly declared prohibited or contraband, or which are not enemy’s property.” The following article is still more explicit:—“And to the end that it may be known to all those who shall read these presents what are the goods, especially excepted and prohibited, or regarded as contraband, to enumerate them here according to the aforesaid eleventh article of the treaty of London. These goods specially designated are the following,” etc. Here follows the enumeration, as in the eleventh article, which makes no mention of naval stores.”<sup>u</sup>

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<sup>t</sup> Robinson’s Admiralty Reports, vol. i. p. 372. *The Maria*.

<sup>u</sup> Schlegel, *Examen de la Sentence prononcée par le tribunal d’Amirauté Angloise le 11 Juin, 1799, dans l’affaire du convoi Suédois*, p. 125.

An impartial examination of these treaties will be sufficient to show that they do not authorize the intercepting naval stores, the native produce of Sweden, even in order to apply to them the mitigated right of pre-emption, much less of confiscating them as contraband of war.

The original treaty of 1670 between Denmark and England spoken of by Sir W. Scott, had declared contraband "provisions of war, *as soldiers, arms, engines, guns, ships, or other necessaries for the use of war.*"

By the treaty of 1742 between Denmark and France, above referred to by Valin, the former power had consented to consider naval stores as contraband; and in order to explain whatever there might be considered as equivocal in the language of the treaty of 1674, as well as to place France and England on an equal footing, the treaty of 1780 was concluded between Denmark and England. This treaty provided that "in order to leave no doubt upon what is to be understood by the term contraband, it is agreed that this denomination is meant only to comprehend fire arms and weapons of other kinds, with their accoutrements as canons, muskets," (here follows a long specification,) "and generally all other warlike accoutrements; also ship timber, tar, pitch, rosin, sheet copper, sails, hemp, and generally whatever serves for the equipment of ships; unwrought iron and deal planks excepted." It is also "expressly declared that this kind of contraband merchandize shall by no means comprehend fish and flesh, fresh or salted; wheat, flour, corn, or other grain; garden-stuff, oil, wine, and generally whatever serves for the nourishment and support of life, except they are conveyed to places in a state of seige or blockade."<sup>v</sup>

The more ancient law of France seems to have subjected contraband goods going to the enemy, not to confiscation as prize of war, but to the exercise of the milder right

Right of pre-emption.

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<sup>v</sup> Martens, *Recueil des Traités*, tom. iii. p. 177.

of pre-emption. Such, according to Grotius, is the true sense of the French ordinance of 1584, art. 69. He sub-joins that a different rule had been sometimes adopted among the northern nations, but that the usage on this subject had been variable, and accommodated to temporary circumstances rather than founded upon perpetual maxims of equity.\*

Confiscation  
of vehicle of  
contraband,  
and of inno-  
cent with un-  
lawful articles.

The Marine Ordinance of Louis XIV, 1681, and the *Réglement* of the 23d July, 1704, subjected the contraband articles to confiscation, but the innocent goods and the ship were free.

Bynkershoek, speaking with reference to the ordinances and treaties of Holland, made between the peace of Westphalia and that of Utrecht, holds that so far as these were to be considered as evidence of the law of nations, the contraband articles only were liable to confiscation, whilst the innocent articles and the vehicle in which they were carried were free from the penalty. "Such," says he, "are the rules laid down by our own laws and treaties, and if we are to infer from them what the law of nations is, it will follow that ships and lawful goods are never to be condemned on account of contraband merchandize carried on board of the same vessel. But it is not from thence that the law of nations is to be deduced. Reason, as we have said before, is the supreme law of nations, and she does not permit that we should understand these things altogether generally and without distinction." He then goes on to make a number of distinctions drawn from the analogy of the Roman fiscal law, by which he acquits or condemns the vessel according to the fact of the owner's ignorance or knowledge of the contraband being shipped.\*

Zouch quotes an ancient author, *Petrinus Bellus*, (De

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\* Robinson's *Collectanea Maritima*, p. 123. Grotius, de J. B. ac P. lib. iii. cap. i. § v. No. 6.

\* Bynkershoek, Q. J. Pub. lib. i. cap. xii.

Re Militari, p. 9, 22, 26-28,) to show that there is a wide distinction to be made between the case where both the contraband goods and the lawful goods belong to the same owner, and where they are the property of different persons. He holds that the whole may be justly condemned, if they are the property of the same owner; but in the case quoted by him from Petrinus Bellus, it appears that the owner knew of the fraudulent shipment, which would subject his property to confiscation according to the Roman law, from which the earlier publicists were fond of drawing their illustrations.<sup>7</sup>

Zouch does not state what was the usage of his own country at the time when he wrote, but it appears from other authorities to have been the early practice of the English admiralty courts to condemn both ship and cargo; which was subsequently relaxed, so as to limit the confiscation of the ship and the innocent parts of the cargo to cases where they belong to the owners of the contraband, or where the shipment of the contraband is attempted to be concealed under false papers and false destination.<sup>8</sup> Naval stores and provisions are subject by the modern British practice to the right of pre-emption only.<sup>9</sup> And Sir William Scott, in the same case of the Swedish convoy above cited, states "that in the year 1750 the lords of appeal in this country declared pitch and tar, the produce of Sweden, and on board a Swedish ship bound to a French port, to be contraband, and subject to confiscation in the memorable case of the *Med Goods Hjelpe*. In the more modern understanding of this matter, goods of this nature, being the produce of Sweden, and the actual property of Swedes, and conveyed by their own navigation, have been deemed in British courts of admiralty, upon a principle of indulgence

<sup>7</sup> Zouch, Jur. et Jud. Feodalis, p. ii. § viii. qu. 13.

<sup>8</sup> Robinson's Admiralty Reports, vol. iii. p. 221, note a.

<sup>9</sup> Robinson's Admiralty Reports, vol. ii. p. 175. The Haabet.

to the native products and ordinary commerce of that country, subject only to milder rights of pre-occupancy and pre-emption, or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice."<sup>b</sup>

Heineccius, writing about the same time with Bynkershoek, states that by the then established usage of nations, the ship was involved in the confiscation of the contraband cargo, unless the contraband was put on board without the knowledge or consent of the owner. He quotes an ordinance of the States General of 1648, and of the king of Denmark of 1659, to the purpose of confiscating the ship, and he deduces the exception from the Roman law. He adds that this law of usage had frequently been changed between nations by compact exempting the ship from confiscation, and quotes to this effect the treaties of 1648 and 1650 between Holland and Spain, and of 1655 between France and the Hanseatic towns. He concludes: "*Sed quemadmodum ejus modi pacta ad exceptionem pertinent: ita facile patet, regulam istis non tolli, adeoque certi juris esse, ob merces illicitas naves etiam in commissam cadere.*"<sup>c</sup>

Bynkershoek enumerates a number of treaties previous to the peace of Utrecht, in which, not only the ship and innocent articles are declared free, but the ship is to be immediately restored, with the remainder of her cargo, and suffered to proceed on her destined voyage, without being

<sup>b</sup> Robinson's Admiralty Reports, vol. i. p. 373. *The Maria*.

<sup>c</sup> Heineccius, de Nav. ob Vect. Merc. Vetit. Comm. cap. ii. § iii.—vi. The Danish ordinance quoted by Heineccius does not support his position. Although its list of contraband is very extensive, it expressly exempts the vehicle in which they are carried from confiscation. (Robinson's *Collectanea Maritima*, p. 185.)

sent into port for adjudication as is provided in other treaties and ordinances.<sup>d</sup> The treaty of commerce concluded at Utrecht, 1713, between France and Great Britain, art. 26, stipulated that "the contraband goods, discovered by the search thus made, shall not be sold, exchanged, or otherwise alienated in any manner whatever, until a regular proceeding, according to the laws and customs, against the prohibited goods, and until they shall have been condemned by the respective judges of the admiralty; excepting, however, the vessel itself and the other merchandize found on board, and which are to be considered as free by the present treaty, and without their being detained under the pretext that they are laden with prohibited goods, and still less confiscated as lawful prize."<sup>e</sup>

Another exception to the general freedom of neutral commerce and navigation in time of war, recognized by the approved usage of the period now in question, was the trade to places actually besieged, invested or blockaded. § 16. Blockade.

We have already seen that Grotius, writing in the preceding age on the respective limits of belligerent and neutral rights respecting trade and navigation, which he states had been and still continued the subject of sharp contention, prohibits the carrying any thing to besieged or blockaded places as tending to impede the execution of the lawful design of the belligerent in endeavoring to compel his enemy to surrender or make peace.<sup>f</sup> Opinion of Grotius.

Bynkershoek, in commenting upon this passage of Grotius, has perhaps mistaken his meaning in supposing that he requires as a *necessary ingredient* in a strict blockade that there should be an expectation of peace, or of a surrender, whereas he probably merely mentions that as an *example*, and by way of putting the strongest possible case.<sup>g</sup>

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<sup>d</sup> Bynkershoek, Q. J. Pub. lib. i. cap. xii.

<sup>e</sup> Dumont, Corps Diplomatique, tom. viii. p. i. p. 349.

<sup>f</sup> Vide ante, § 15.

<sup>g</sup> Duponceau's Translation of Bynkershoek, p. 83, note.

Bynkershoek also contests the mild doctrine of Grotius, which limits the right of the belligerent in such a case to require an indemnity from the neutral for the damage occasioned by his fault, and if no actual damage has been suffered, that the latter may only be compelled by the detention of his goods to give security that he will not do the like in future. But we are not to understand Grotius as thus limiting the penalty for a breach of blockade in all cases; for he adds in the latter part of the passage, that where the neutral contributes by his supplies to sustain the enemy in an unjust war, he ought to be held, not only civilly, but criminally responsible, like a party who screens a fugitive from justice, and to be punished accordingly, even by the confiscation of his goods in a suitable case.<sup>1</sup>

Of Bynkershoek.

Bynkershoek then proceeds to expound the law of blockade, as defined by treaties previous to those of Utrecht, and by belligerent ordinances issued during the second war waged by the Dutch for their independence of Spain. He enumerates a number of treaties between the States General and other powers, in which the carrying of any thing to places blockaded or besieged is prohibited, without specifying the penalty for a breach of the prohibition. He infers however that if the carrying any thing to such places be unlawful, the goods thus carried must be contraband, and as such liable to confiscation. He comments at large upon a remarkable decree of the States General published in 1630, with the advice of the courts of admiralty and the ablest Dutch civilians, to regulate the blockade of the ports of Flanders in possession of Spain.

The text of this ordinance, with the commentary of

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<sup>1</sup> Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere, quod delicto convenit, secundum ea quæ de pœnis diximus; quare intra eum modum etiam spoliari poterit. (Grotius, de J. B. ac P. lib. iii. cap. i. § v. No. 8.)

Bynkershoek upon its provisions will give us a complete notion of the law of blockade as understood among maritime nations from the time, when this decree was issued until the period when he wrote.

1. Les Etats Generaux des Provinces Unis aiant reçu et pesé les positions des cas ci à côté, ont après une mûre délibération préalable et sur l'avis des respectifs colleges de l'Amirauté trouvé bon et entendu à l'égard du premier point, que les vaisseaux neutres qu'on trouvera qu'ils sortent des ports ennemis de Flandres, ou qu'ils y entrent, ou qu'ils sont si près qu'il est indubitable qu'ils y veulent entrer, que ces vaisseaux avec leurs marchandises doivent être confisqués par sentence des susdits respectifs colleges, et cela à cause que leurs Hautes Puissances tiennent continuellement les dits ports bloqués par leurs vaisseaux de Guerre à la charge excessive de l'Etat, afin d'empêcher le transport et le commerce avec l'ennemi, et parceque ces ports et ces places sont réputés être assiégés, ce qui a été de tout temps un ancien usage selon l'exemple de tous les Rois, Princes, Puissances, et autres Républiques qui se sont servis du même droit dans de semblables occasions.

" 2. A l'égard du second point, Leurs Hautes Puissances déclarent, que les vaisseaux et marchandises neutres seront aussi confisqués quand il constera par les lettres de Cargaison, Connoissemens, ou autres Documens, qu'ils ont été chargés dans les ports de Flandres, ou qu'ils sont destinés d'y aller, quand même on ne les auroit rencontrés que bien loin encore de là, de sorte qu'ils pourroient encore changer de route et d'intention. Ceci étant fondé sur ce qu'ils ont déjà tenté quelque chose d'illicite, et mis en oeuvre, quoi-qu'ils ne l'ayent pas achevé, ni porté au dernier point de perfection, à moins que les maîtres et les propriétaires de tels vaisseaux, ne fissent voir dûment qu'ils avoient désisté de leur propre mouvement de leur entreprise et voyage destiné, et cela avant qu'aucun vaisseau de l'Etat les eût vû ou poursuivi, et que ceux-ci trouvassent la chose sans fraude : ce qu'on pourra juger en examinant la nature de



l'affaire par des conjectures, les circonstances et l'occasion.

“ 3. A l'égard du troisième point, Leur Hautes Puissances déclarent, que les vaisseaux revenans des ports de Flandres (sans y avoir été jetés par une extrême nécessité), et quoique rencontrés loin de là dans le Canal ou dans la Mer du nord, par les vaisseaux de l'Etat, quand même ils n'auroient pas été vûs ni poursuivis par ceux ci en sortant de là, seront aussi confisqués, à cause que tels Navires sont censés avoir été pris sur le fait, tant qu'ils n'ont point achevé ce voyage, et qu'ils ne sont point sauvés dans quelque port libre, ou appartenant à un Prince neutre. Mais ayant été, comme il a été dit, dans un port libre, et étant pris par les vaisseaux de Guerre de l'Etat dans un autre voyage, ces vaisseaux et marchandises ne seront point confisqués ; à moins qu'ils n'ayent été en sortant des ports de Flandres suivis par les vaisseaux de Guerre, et poursuivis jusques dans un autre port que le leur, ou celui de leur destination, et qu'en sortant de nouveau de là, ils ayent été pris en pleine Mer.”<sup>i</sup>

As to the first article, which condemns not only neutral ships, with their cargoes, found actually going into or coming out of the enemy's ports, but also those which should be found so near to those ports as to show beyond a doubt that they intended to run into them, Bynkershoek considers that this latter provision is fully justified as a rule of evidence by the general presumption, which the more ancient public jurists established, where contraband goods are found on the confines of the hostile territory. The only exception to this general presumption admitted by him is that arising from stress of weather.

He also approves of the second article, as collecting the intention to violate the blockade from the express admission of the party himself, contained in the documents found on

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<sup>i</sup> Robinson's *Collectanea Maritima*, p. 158.

board, in like manner as the same intention is tacitly collected under the first article from circumstantial evidence. But he finds some difficulty in sanctioning the *locus penitentiae* accorded by the edict unless upon very clear proof of the alteration of the voyage.

The third article he considers as properly distinguishing between vessels which are *chased* or compelled to take refuge, and those which proceed *voluntarily* to the port of their *destination*. "The latter are excused" says he, "when found coming out of that port, their voyage being considered as ended, and a new one begun, while the former are condemned as being taken in the very act of violating the blockade. But on the subject of these, the edict speaks in the disjunctive, and says 'if they are chased into *their own port, or the port of their destination*,' so that there may be a doubt as to the sense of these words, and the law which results from them. Certainly there can be no doubt if the same thing is meant by *their own port*, and the port of *their destination*. But if an Englishman who was bound to a port of Denmark, is driven into a port of England, and coming out of it, and prosecuting his voyage, should be taken before he reached the Danish port, it appears to me that he would be taken in the course, and in the very act of the illicit voyage, and that it would be of no consequence whether it was his port, or not, which he had entered into, if the voyage which he was engaged in had not been completely finished. Therefore as disjunctives are frequently to be construed as conjunctives, I understand these words *their own port*, in the said article to mean the port to which the vessel was bound, and where her voyage was to be ended."<sup>k</sup>

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<sup>k</sup> My learned friend, Mr. Duponceau, the translator of Bynkershoek, supposes that this part of the edict is too plain to require any constructive interpretation, "since whether the vessel was chased into the actual port of her destination, or into any other port of her own country, she is equally to be condemned according to the letter of the law as it is given to

The above extracts from Bynkershoek are sufficient to show that the leading principles of the law of blockade, as understood and practiced at the period of which he speaks, as well as in his own times, were the same or nearly the same, as the approved practice of maritime nations, countenances at the present day. And that this great lawyer had no idea that a blockade by proclamation, or what has been called in our times a *paper blockade*, could rightfully interfere with neutral commerce, is evident from the fact which he states that the above decree of 1630 was for some time not carried into effect by the actual application of a force sufficient to maintain the blockade, and in the meanwhile, a free commercial intercourse was, in 1642, carried on with Flanders. "During that period" says he "certain neutral vessels trading thither were captured by our vessels, and carried into Zealand. The contraband goods, however, were alone detained and condemned, and all the remainder were acquitted and restored. It has been asked by what law the contraband goods were condemned under those circumstances; and there are those who deny the legality of their condemnation. It is evident, however, that while these coasts were guarded in a lax or remiss manner, the law of blockade by which *all* neutral goods going to, or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation."<sup>1</sup> And in his *fourth* chapter, he reprobates the inconsistency of the States General, who in 1652 "boasted that they had prohibited all trade with the English to all the world," and in 1663, "denied to the Spaniards, who

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us. So that the interpretation, which our author contends for, appears to us to be not only unnecessary but dangerous, as it would make a merely *constructive* offence of what the legislator expressly made a positive one." (Duponceau, Transl. of Bynkershoek's Law of War, p. 90, note.)

<sup>1</sup> Bynkershoek, Q. J. Pub. Lib. i. cap. xi.

pretended to blockade the whole of Portugal, that same right which they had before arrogated to themselves against the English."<sup>m</sup>

Arrogant and unfounded as was this pretension, it was subsequently maintained both by England and Holland, jointly, in that war, which broke out immediately after the English revolution of 1688, and the formation of what is called by the English historians the Great Alliance against France. A convention was concluded between the allied powers of England and Holland, at London, on the 22d of August, 1689, in the preamble of which they state, "that having declared war against the Most Christian King, it behoves them to do as much damage as possible to the common enemy, in order to bring him to such conditions as may restore the repose of Christendom: and that, for this purpose it was necessary to interrupt all trade and commerce with the subjects of the said king; and that to effect this, they had ordered their fleets to block up all the ports and havens of France." And by the second and third

Interdiction  
of all neutral  
commerce  
with France  
by G. Britain  
and Holland,  
1689.

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<sup>m</sup> Id vero, neque aliud Ordines Generales complexi sunt illo Decreto 26 Junii, 1690, ex quo ad eam, de qua nunc disputo, quæstionem recte argumentaberis, si et anno 1666 Angliam, Scotiam, Hiberniam, et omnia illa quæ in Asia, Africa, et America habebant Angli, classibus suis obsessa habuerint Ordines Generales. Relatum quidem est, eodem Ordines anno 1652, quod ad Anglos, tale quid jactitasse, omnibus sic interdicto cum Anglis commercio, sed quo jure jactitarunt nunc non quæro, contentus monere, eodem Ordines anno 1663 Hispanis, cum hi Lysitaniam obsessam habere videri vellent, id ipsum negasse, quod contra Anglos antea sibi arrogaverant, sic enim proditum est in Annalibus. (Bynkershoek, Q. T. Pub. Lib. i. cap. iv.)

See an account of a blockade of the Russian ports in the Baltic, proclaimed in 1711, by Charles XII of Sweden, but contested by Great Britain and Holland, (then neutral in the war between Sweden and Russia,) upon the alleged ground of its not being maintained by an adequate force. In one of the British memorials on this occasion, it is said: Si les dites villes étoient actuellement assiégées ou bloquées, les sujets de sa majesté ou de leurs Hautes Puissances n'auroient point de prétexte d'y aller; mais le cas est bien différent par rapport à quelques vaisseaux qui croisent seulement dans la mer Baltique." (Robinson's Collectanea Maritima, p. 162, note.)

articles, it was agreed "that they would take any vessel, whatever king or state it may belong to, that shall be found sailing into or out of the ports of France, and condemn both vessel and merchandize as lawful prize ; and that this resolution should be notified to all neutral states."<sup>a</sup>

This pretension was resisted on the part of the Baltic powers, whose commercial interests were principally affected by it, Sweden and Denmark having entered into a counter-treaty in 1693, for the purpose of maintaining their neutral rights. In the preamble to this treaty it is declared that : " Although their majesties the Kings of Sweden and Denmark had hoped, that after they had declared their treaty of March, 1691, for maintaining their navigation and commerce, the many unjust piracies exercised on their subjects, would at length have ceased ; they have nevertheless been grieved to find that notwithstanding the remonstrances which they have from time to time made to the parties engaged in the war, in order to put an end to them, they have increased, even to a point that it is impossible to express," &c.

In a letter written by Puffendorf to Groningius, who had consulted the former on a work he had planned on the freedom of navigation, Puffendorf endeavors to justify, or at least to palliate the above measure of the belligerent powers, upon grounds of temporary expediency by which similar prohibitions of all neutral commerce with an enemy have been defended in our own times. He urges the propriety of the northern powers temporizing on a question which concerned merely the selfish interests of trade, " while other nations unite all their forces to reduce within bounds an insolent and exorbitant power, which threatens Europe with slavery, and the protestant religion with destruction."<sup>o</sup>

These reasons did not, however, appear to the neutral

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<sup>a</sup> Jenkinson (Lord Liverpool) Discourse, &c. p. 36, edit. 1806.

<sup>o</sup> Groningius, Bibliotheca Universalis Librorum Judic. p. 105.

powers to be sufficient to induce them to desist from their complaints, whilst, as we are informed by Vattel, the allied belligerent powers did them justice.<sup>p</sup>

We have already seen that the ancient compilation of the *Consolato del Mare*, in recognizing the right to capture enemy's property on board of neutral vessels, evidently recognizes the belligerent right of visitation and search for the purpose of ascertaining the proprietary interest. The same right is asserted in the earlier maritime regulations both of France and England as incident to the right of capturing enemy's property and contraband of war. Forcible resistance to the exercise of this right was punished with the penalty of confiscation.<sup>q</sup>

§ 17 Right of visitation and search.

These provisions were copied into the Marine Ordinance of Louis XIV, 1681, which declares that every vessel shall be good prize in case of "resistance *and* combat." Valin states that though the expression is in the conjunctive, yet that the resistance alone was deemed sufficient. He refers to the Spanish ordinance of 1718, evidently copied from the French, in which it is expressed in the disjunctive "in case of resistance *or* combat."<sup>r</sup>

Notwithstanding these positive enactments of three of the great leading maritime states of Europe, the exercise

<sup>p</sup> Vattel, liv. 3, ch. 7, § 112. Grotius (De J. B. ac P. lib. iii. cap. i. § v. note 6,) enumerates many examples of belligerent attempts to prohibit all neutral commerce with an enemy, which gave rise to the declaratory articles contained in several of the treaties of the seventeenth century affirming the right to carry on such trade, with the usual exceptions of contraband and blockaded ports.

<sup>q</sup> Robinson's *Collectanea Maritima*, pp. 10—16, 118. Letter of Edward III. Instructions of Henry VIII, anno 1512, art. 20. English Order in Council, 1664. Ordinance of France, anno 1584, art. 65.

<sup>r</sup> Tout vaisseau qui refusera d'amener ses voiles, après la semonce qui lui en a été faite par nos vaisseaux, ou ceux de nos sujets armés en guerre, pourra y être contraint par artillerie ou autrement, et en cas de resistance et de combat, il sera de bonne prise. (Ordonnance de la Marine, liv. 3, tit. 9, des Prises, art. 12. Valin, *Traité des Prises*, ch. 5, § 8, no. 6.)

of the right of search, constantly continued a subject of contention between them, and also with respect to other nations, such as Holland and the Baltic powers. These disputes gave rise to various treaty stipulations relaxing the extreme rigour of the rule, regulating the manner of exercising the right, and occasionally suspending it altogether under peculiar circumstances.\* It is often difficult to distinguish in these discussions, those which arose out of the claim of the English to the sovereignty of the seas surrounding the British islands, (where they asserted a right of search which they denied to others, founding it upon territorial jurisdiction,) from the more general claim of a right of search in time of war, common to all belligerent nations. During the struggle for naval superiority which took place between the principal maritime states of Europe about the middle of the seventeenth century, the claim of resisting the exercise of the right of search by means of the protection of a convoy of the public ships of war of the neutral power, was advanced by Christina, Queen of Sweden. In the declaration published by her in 1653, during the war then raging between the English and Dutch republics, she disclaimed the pretension of screening enemy's property from capture, and expressly limited the protection of the convoy to Swedish and other neutral trade to neutral ports, without however, any hindrance to her "own subjects, that intend to carry on their own, and other free trade to England or Holland without convoy."† It does not appear whether this pretension was actually attempted to be carried into effect, or in what manner it was met by the belligerent powers, as peace was concluded between the two republics in the following year, 1654. Indeed it seems almost certain that this declaration was never acted upon, for which Puffendorf in

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\* Robinson's *Collectanea Maritima*, pp. 36—50.

† Thurloe's *State Papers*, vol. i. p. 424.

his Swedish history assigns two reasons : first, that a peace was speedily expected ; secondly, "that the queen was afraid of being involved in a war, if the Swedes opposed the English or the Dutch in visiting and searching their ships, and a battle should ensue, as is usual in such cases."<sup>a</sup>

The Danish civil code of Christian V, anno 1688, ch. 7, art. 2, directs that "when from fear of privateers, or other accidents, any vessels belonging to subjects of Denmark should associate to sail together, and there should be found among them any vessel in a state to be fitted for military service, it should be authorized to carry the royal flag, protect the rest, and not to suffer foreign vessels to board, visit, or see its papers, under any pretence whatever, but on the contrary to keep them at the greatest distance possible, in which the other vessels sailing with it are bound to assist it with all their power ; and if any foreign vessel should attempt to compel it by force to such visitation it is bound to oppose it with all its power, and not to permit any thing that amounts to an attack upon the majesty of the king or of his subjects."<sup>v</sup>

Supposing this provision to be meant as authorizing resistance by the ship bearing the royal standard, to visitation and search, on the part of a foreign cruizer, of the vessels under convoy, it was probably copied from the maritime regulations which prevailed during the middle age, both in the north and in the south of Europe, under which merchant vessels were in the habit of confederating together for mu-

<sup>a</sup> Omittebat tamen id consilium onerarias naves bellicis conducendi Regina, quod pax brevi inter bellantes coitura videretur, ac ne forte hac occasione invita in bellum traheretur, si Angli aut Hollandi navarchi Suecicas naves excutere auderent, Suecisque navarchis id abnuentibus ad manus uti solet caset perventum. (Puffend. Rer. Suec. lib. xxv. § 41.)

<sup>v</sup> Schlegel, Examen de la Sentence prononcée par le tribunal d'Amirauté Angloise le 11 Juin, 1799, dans l'affaire du Convoi Suédois.



tual protection against pirates and public enemies.<sup>w</sup> It does not appear to have been called into activity after its re-enactment in the code of Christian V, and its practical application to authorize resistance to belligerent visitation and search, could hardly be reconciled with the obligation of the treaties then subsisting between Denmark and other maritime states.

In 1654, some Dutch vessels under convoy of a man-of-war, were searched by the English in the Downs. Complaint being made to the States General, two questions arose, one upon the searching of the *man-of-war* itself, the other upon the searching of the *merchant vessels*. Upon the first question, it was resolved by the States General "that all captains in their service should be commanded not to condescend to the commands of foreigners, nor permit their ships to be searched. But as to the second article touching the searching of merchant vessels of this country, their high mightinesses do conform to what, by this state, in regard to merchant ships of other nations, has heretofore been regulated and practiced even against English ships that were under a convoy; and though they are persuaded that such a visitation and search tends to an inconvenience of trade, yet, one can make no reasonable complaints on that account, nor demand that they would desist from it as illegal." It was resolved, likewise, that application should be made to the English government "to have the matter of visitation and search regulated and ordered, so as it may be done with the least hindrance of trade on both sides like as had been done by regulations contained in treaties with the kings of France and Spain."<sup>x</sup>

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<sup>w</sup> Loccenius, *De Jure Maritimo*, lib. ii. cap. ii. *Consolato del Mare*, cap. 283, Ital. ed. These associations were termed *Admiralitas*, *Conservagio*, *Admiralschaft*, &c. Heineccius refers to the above Danish law, as being intended to regulate such an association. (*De Nav. ob Vect. Merc. Vetit. Comm.*, cap. ii. § xv.)

<sup>x</sup> Thurloe's State Papers, vol. ii. p. 503.

In 1655 the English agent in Holland wrote: "They have a design to hinder the protector all visitation and search, and this by very strong and sufficient convoy, and by this means will draw all trade to themselves and their ships."<sup>7</sup>

In 1656, the admiralties of Amsterdam and Rotterdam made an order for their commanders to show all honor of salutes to English men-of-war, and if they pretended to visit, to use them civilly and suffer them to speak with the vessels under their convoy, and to see their contents and papers, but if they offered to visit, they should oppose it." And in May of that year there happened an actual rencontre on this subject between a fleet of Dutch merchantmen coming from Cadiz and bound to Holland, (Spain being then at war with England,) under the convoy of De Ruyter with seven men-of-war, and the commodore of some English frigates, who finding themselves unequal to cope with the Dutch admiral, accepted his declaration that there "was not any thing on board belonging to the king of Spain."<sup>8</sup>

In August of the same year, the Protector Cromwell wrote to Admiral Montagu: "The secretary hath communicated to us your letter of the 28th, by which you acquaint him with the directions you have given for the searching of a Flushing and other Dutch ships, which (as you are informed) have bullion and other goods aboard them belonging to the Spaniard the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the law of nations and the particular treaties which are between this commonwealth and the United Provinces, and therefore we desire you to continue the said direction, and to require the captains to be

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<sup>7</sup> Thurloe's State Papers, vol. iv. p. 203.

<sup>8</sup> *Ib.* vol. iv. p. 730—740.

careful in doing their duty therein.”<sup>a</sup> In the negotiation carried on during the same year for a commercial treaty between the two republics, the proposition of exempting from search by the protection of convoy was strongly urged by the Dutch ambassador Nieuport. On the 21st of September, 1657, he wrote : “ respecting secret articles concerning the visitation of ships which are convoyed under the flag of the state, I acquainted their lordships, that of old all kings and states had made a difference between particular ships sailing upon their risk and adventures, and ships of the state, and those which pass the sea under their flag and protection. That their high and mighty lords were of an opinion that it does strengthen the security of their state, that the ships of the state and officers should be responsible as it were, for the ships sailing under their convoy ; and that which I had proposed in my last memorandum concerning the same on behalf of their high and mighty lords was no new thing, but that plan had been most commonly proposed in all the treaties since the year 1651, in that manner that without regulating the same according to the said articles, the troubles at sea, whereof I have so often complained, could not be removed and prevented, and I alleged several examples. Upon which now one, then the other of the said three lords (Thurloe, Wolsely and Jones) replied, and did very much insist, that it could not consist with their security, that they could not, nor ought to trust so much to particular captains at sea ; that it would be an introduction and encouragement to disaffected persons to assist the enemy ; and urged especially that in no former treaties any such articles were found, and that their high and mighty lords had no reason to desire now any such novelty. I said that the practice on this side in regard to searching and visiting ships without difference was a new thing, and that the inhabitants of the United

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<sup>a</sup> Thurloe's State Papers, vol. iv. p. 740.

Netherlands, feeling the trouble and inconveniency of it, had reason to insist that it may be rectified by a good regulation.”<sup>b</sup> The Dutch ambassador finally left England, *re infectâ*, the Protector continuing strenuously to insist upon the contrary pretention: and another letter in Thurloe’s collection intimates that his country was easily reconciled to his failure in the negotiation as Holland might soon have occasion to exercise this belligerent right in the war then just breaking out with Portugal.<sup>c</sup>

We have already seen that Bynkershoek, writing subsequent to the peace of Utrecht,—lays down the rule that enemy’s goods, found on board a neutral vessel, may be taken and confiscated, unless where special treaties had created exceptions to the pre-existing law, and established the rule of free ships free goods between the contracting parties. In reasoning upon this principle of the primitive law of nations, he answers the objection, that a belligerent cannot take his enemy’s goods out of a neutral vessel without taking the neutral vessel itself, “and that it is quite as unlawful as if he were to attack that enemy in a neutral port, or to commit depredations in the territory of a friend. But,” (continues he,) “it ought to be observed, that it is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves, which are on board, whether she is really neutral. If she appears to be such, then she is to be dismissed, otherwise she may be captured. And if this is lawful, as on every principle it is, and as it is generally practiced, it will be lawful also to examine the documents which concern the cargo, and from thence to

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<sup>b</sup> Thurloe’s State Papers, vol. vi. p. 511.

<sup>c</sup> “It est fort croyable que le sieur Nieuport ne sera guère content d’avoir faillé à achever le traité de la marine; néanmoins, je m’imagine que la Hollande à présent ne seroit pas fort marry de ne l’avoir pas achevé, pour ne se pas oster la liberté de visiter les mêmes en cette guerre contre le Portugal.” Letter from the Hague, 30 Nov. 1657. (Thurloe’s State Papers, vol. vi. p. 621.)

learn whether there are enemy's goods concealed on board," etc.<sup>d</sup>

It is evident that this examination of the ship's papers cannot take place without the exercise of the right of visitation and search. This passage consequently shows what, in the opinion of this eminent jurist, was the approved practice of nations on this subject at the period referred to; and that the right of visitation and search was actually asserted by his country when belligerent, appears from the testimony of history, although they often sought to exempt their own flag from its operation, when neutral, in order to secure to themselves the carrying trade under their favorite maxim of free ships free goods. That principle was finally  
 ? conceded to them by England in the treaty of 1666, confirmed by that of 1673, which treaties are both entirely silent upon the question of convoy; which expressly except contraband articles from the general freedom of the neutral flag; and which require certain documentary evidence respecting the national character of the ship. Passports and other papers may be falsely and fraudulently assumed as well as the flag, and it is not to be supposed that the protection of the treaties was meant to extend to a neutrality falsely and fraudulently assumed in order to cover and conceal enemy's interests in the ship as well as the cargo.

§ 18. Dominion of the seas.

The period of which we are now treating was fruitful in international controversies respecting the sovereignty of the seas. The question how far the open sea, or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, had exercised the pens of the most eminent European publicists during the former part of the seventeenth century. The extravagant claims of Spain and Portugal to the exclusive dominion both of the lands and seas of the new world under the famous papal grant of Pope Alexander VI, founded on

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<sup>d</sup> Bynkershoek, Q. J. Pub. lib. i. cap. xiv.

the right of discovery and conquest, were contested by the Dutch who had shaken off the political yoke of Spain and the religious yoke of Rome. Their great public jurist and statesman, Grotius, took the lead in maintaining the common rights of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific oceans against these pretensions. His treatise *De Mare Libero* was published in 1609.<sup>e</sup> In his subsequent work *De Jure Belli ac Pacis*, first published in 1625, he hardly admits more than the possibility of appropriating the waters immediately contiguous; though he adduces a number of quotations from ancient authors, showing that a broader pretention has been sometimes sanctioned by usage and opinion. But he never intimates that any thing more than a limited portion could be thus claimed; and he uniformly speaks of *pars* or *portus maris*, always confining his view to the effect of the neighbouring land in giving a national jurisdiction and property of this sort.<sup>f</sup>

Grotius,  
*Mare liberum.*

Albericus Gentilis, the forerunner of Grotius in the science of international law, and professor of Roman law in the university of Oxford, had supported the claim of sovereignty asserted by the kings of England over the British seas in his *Advocatio Hispanica* published in 1613.<sup>g</sup>

Albericus  
Gentilis, *Ad-  
vocatio His-  
panica.*

In 1635, the learned Selden published his *Mare clausum*, under the patronage of Archbishop Laud, in which the general principles maintained by Grotius in his *Mare liberum* are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property; which he attempts to show,

Selden,  
*Mare clau-  
sum.*

<sup>e</sup> Hugonis Grotii *Mare liberum, seu de jure, quod Batavis competit ad Indicana commercia*, Dissertatio. It was first published anonymously at Leyden in 1609, and afterwards at the same place with the author's name in 1616.

<sup>f</sup> Grotius, de J. B. ac P. lib. ii. cap. iii. §§ viii, xiii.

<sup>g</sup> *Advocatio Hispanica*, lib. i. cap. viii.

not by reasoning, but by collecting a multitude of quotations from ancient authors, in the style of Grotius but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of nations. And in the second part, which is indeed the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great Britain is entitled to the sovereignty of what are called the *Narrow seas*.<sup>h</sup>

Opinion of  
Puffendorf.

Puffendorf, whose work on the law of Nature and Nations was published in 1672, lays it down that in a narrow sea the dominion belongs to the sovereigns of the surrounding land; and is distributed, where there are several such sovereigns, according to the rules applicable to neighboring proprietors on a lake or river, supposing no compact has been made, "as is pretended," he says, "by Great Britain." But he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated.<sup>i</sup>

Disputes be-  
tween Great  
Britain and  
Holland re-  
specting the  
sovereignty of  
the British  
seas.

The claim on the part of the English kings to a right of sovereignty over the seas, was asserted by them principally in attempting to exclude other nations from fishing, and in requiring all foreign vessels, public or private, to salute their ships of war within the four seas surrounding the islands of Great Britain and Ireland. The exclusive right to the fisheries within these seas and near the coasts of the British islands had been occasionally acknowledged by the Dutch in the form of annual payments and taking out licenses to fish; and was again suspended by treaties between the sovereigns of England and the princes of the

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<sup>h</sup> Joh. Seldeni, *Mare clausum, sive de dominio maris, Libri ii. Primo*, mare ex jure naturæ sive gentium omnium hominum non esse commune, sed dominii privati sive proprietatis capax pariter ac tellurem esse demonstratur; *Secundo*, Serenissimum Magnæ Britanniae Regem maris circumflui ut individuum atque perpetuum Imperii Britannici appendicis dominum esse asseritur.

<sup>i</sup> Puffendorf, de Jure Naturæ et Gentium, lib. iv. cap. v. § 7.

house of Burgundy. The naval honours claimed for the royal flag from the earliest times became a perpetual subject of contest with other maritime nations, and the pretext, if not the real cause, of several wars with Holland in the time of the English Commonwealth and under the later kings of the house of Stuart. England and Holland, being rivals for naval and commercial ascendancy, naturally attached the point of honour to this claim, which the one exacted and the other refused as a badge of superiority. Sir William Temple, in his memoirs, speaking of the negotiations preceding the treaty of peace concluded at Westminster in 1674, states that one of the principal "points of greatest difficulty was that of the flag, which was carried to all the height his majesty could wish; and thereby a claim of the crown, the acknowledgment of its dominion in the Narrow Seas, allowed by treaty from the most powerful of our neighbours at sea, which had never yet been yielded to by the weakest of them that I remember in the whole course of our pretence; and had served hitherto but for an occasion of quarrel, whenever we or they had a mind to it, upon either reasons or conjectures."<sup>k</sup>

France never formally acknowledged the British pretension. Louis XIV published an ordinance on the 15th of April, 1689, not only forbidding his naval officers from saluting the vessels of other princes bearing a flag of equal rank, but on the contrary enjoining them to require the salute from foreign vessels in such a case, and to compel them by force, in whatever seas and on whatever coasts they might be found. This ordinance was plainly levelled at England. Accordingly in the manifesto published by William III on the 27th of May, 1689, he alleged as one

Claim of G.  
Britain resisted  
by France.

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<sup>k</sup> Temple's Memoirs, vol. ii p. 250. Treaty of Westminster, 1674, art. 4. Dumont, Corps Diplomatique, tom. vii. p. i. p. 254. Bynkershoek remarks upon this concession of his country: "Usu scilicet maris et fructu contenti Ordines, aliorum ambitioni, sibi non damnosæ, haud difficulter cedunt." Q. J. Pub. lib. i. cap. xxi.



of the motives for declaring war against France "quel droit de pavillon, qui appartient à la couronne d'Angleterre, a été disputé par son ordre (de Louis XIV) ; ce qui tend à la violation de notre souveraineté sur la mer, laquelle a été maintenue, de tout temps par nos predecesseurs, et que nous sommes aussi résolus de maintenir pour l'honneur de notre couronne et de la nation Angloise."<sup>1</sup>

The historian Hume, speaking of the attack made by the English fleet on the Dutch herring-busses in 1636, says : "They (the Dutch) openly denied, however, the claim of dominion in the seas beyond the friths, bays, and shores ; and it may be questioned whether the laws of nations warrant any further prétensions."<sup>m</sup>

Sir Leoline Jenkins, judge of the English court of admiralty in the reigns of Charles II and James II, in several official reports to those sovereigns, reduces their maritime jurisdiction to these limits, beyond which nothing more was required from other nations than the naval honours due to the royal flag, except that foreign cruizers were prohibited from hovering so near the coasts as to disturb or threaten the security of English vessels, or those of other friendly states navigating the Narrow Seas. This moderate and reasonable definition shows that the maritime sovereignty then claimed by England was not of that extensive, absolute character which might be supposed ; since if it had been so, it would not have been found necessary to limit that protection to which foreign persons and property belonging to states in amity with England were entitled within her neutral jurisdiction. He particularly insists upon the immunity of what are called the *King's Chambers*, (i. e. portions of the sea cut off by strait lines drawn from one promontory to another,) from any acts of foreign

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<sup>1</sup> Valin, Commentaire sur l'Ordonnance, liv. 5, tit. 1, de la liberté de la pêche.

<sup>m</sup> Hume, History of England, vol. vi. ch. 52.

hostility committed therein. In every case of capture by a foreign cruiser within these limits he uniformly decides that the property should be restored to the original owner as having been made in violation of the neutral territory.<sup>a</sup>

Bynkershoek, in his treatise *De Rebus Bellicis*, also extends the protection of the neutral territory to the shores along the coast within the reach of cannon shot, and to the ports, rivers, bays, and other enclosed parts of the sea. He therefore condemns the conduct of different belligerent nations, among others his own, who had committed acts of hostility within these limits during the maritime wars of the  
 • seventeenth century. The only exception that he makes to this rule is where the attack upon an enemy has been commenced without the neutral territory, in which case he holds that it is lawful to continue it there in the heat of action, *dum fervet opus*; with this qualification, that should any injury be done to the persons or property of the neutral state, such an act would constitute an unlawful aggression. He admits, however, that he had never seen this distinction mentioned in the writings of the publicists, or among any European nation, the Dutch only excepted; although he justifies it on the ground of reason and the historical examples he cites of its application.<sup>o</sup>

Bynkershoek had commenced his splendid career as a public jurist by the publication, in 1702, of his treatise *De Dominio Maris*. In this work he admits that certain portions of the sea may be susceptible of exclusive dominion. These are, 1. Those portions near to the land, *mare terræ proximum*, such as are within range of cannon shot along the shores, beyond which the territorial jurisdiction does not in general extend.<sup>p</sup> 2. Such seas as are completely

Bynkershoek,  
*De Dominio  
 Maris.*

<sup>a</sup> Sir L. Jenkins' *Life and Letters*, vol. ii. pp. 727, 732, 755, 780.

<sup>o</sup> Bynkershoek, Q. J. Pub. lib. i. cap. viii.

<sup>p</sup> Alioquin generaliter dicendum est, potestatem terræ finire, ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur. (Bynkershoek, de *Dominio Maris*, cap. ii.)

surrounded by the adjacent territory of any particular state, with an outlet into the ocean, both shores of which seas are exclusively occupied by it. Such was the Mediterranean sea in the time of the Roman empire, and the Black sea at the time when he wrote, all its surrounding shores, and the outlet into the Mediterranean, then belonging exclusively to the Turks. But he asserts that there was no instance at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not belong to him. He denies especially the claim of the English kings to the seas surrounding the British isles, and of the republic of Venice to the Adriatic, on the ground of the want of uninterrupted, exclusive possession. He does not consider the naval honours conceded by the Dutch republic to the royal flag of England as implying an acknowledgment of the sovereignty over the British seas claimed by the latter.<sup>a</sup>

§ 19. Sovereignty claimed by Denmark over the Sound and Belts.

The sovereignty asserted by the kings of Denmark over the Sound and the two Belts which form the outlets of the Baltic into the North sea, is rested by the Danish public jurists upon immemorial prescription, sanctioned by a long succession of treaties with foreign powers. According to

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<sup>a</sup> Ut tamen regis Britannorum navibus, tanquam Principi, reverentia haberetur, obtinuerunt in pacis pactionibus, quæ illis nobiscum intercesse-  
runt anno 1654, 1662, 1667, et 1674, et in § 4, pacis inter Carolum  
II. Angliæ Regem et Ordines fœderati Belgii illo anno 1674, 19 Feb'r.,  
factæ expressum est, Ordines agnoscere, jus esse regis Anglorum navibus,  
ut iis Ordinum etiam totæ classes summum apulstre et supparum submit-  
tant in omni isto mari, quod Septentriones et promontorium, quod *Finis*  
*terre* dicitur, interjacet. Sed quod ita accipiendum est, ut omnes pacti-  
ones quas, ut bello absteineatur, pasciscimur, nempe Anglis id competere,  
quia in id convenit, par se enim nihil in eo mari habent, præcipium. Porro  
ut ita hoc accepi velim, ut ne credamus Belgas eo ipso Anglis concessisse  
illius maris dominium, nam aliud est se subditum profiteri, aliud majestatem  
alicujus Populi comiter conservare, fit hoc, ut intelligamus, alterum Popu-  
lum superiorem esse, non ut intelligamus, alterum non esse liberum. (De  
Dominio Maris, cap. v.)

these writers, the Danish claim of sovereignty has been exercised, from the earliest times, beneficially, for the protection of commerce against pirates and other enemies, and against the perils of the sea, by the establishment of landmarks. But the right to levy tolls on foreign vessels and their cargoes passing through these waters is not claimed as an equivalent for these services. It is considered as incident to the territorial sovereignty over the coasts on both sides of the sound, (which belonged exclusively to Denmark until the province of Scania was ceded to Sweden in 1658,) and over the adjacent islands with the peninsula of Jutland which still belong to Denmark. This claim appears to have been recognized by a treaty with the Hanseatic league as early as 1368; and by that of 1490 with Henry VII, king of England, which prohibits English vessels from passing the Great Belt unless in case of unavoidable necessity; in which case, they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spires in 1544 with the Emperor Charles V, which has commonly been referred to as the origin, or at least the first formal recognition of the Danish right to the Sound duties, merely stipulates in general terms that the merchants of the Low Countries, frequenting the ports of Denmark, shall pay the same duties as formerly.

The tariff of duties thus levied having been arbitrarily increased by the Danish kings gave rise to several maritime confederacies in the latter part of the sixteenth, and beginning of the seventeenth century, between Holland, the Hanseatic republics, and Sweden for the mutual protection of their commerce in the Baltic sea. The disastrous result of the war between Sweden and Denmark compelled the latter to release the Swedish navigation from the payment of these duties by the treaty of peace concluded at Bromsebro in 1645. By another treaty concluded in the same year at Christianopol with Holland, the amount of duties to be levied on Dutch vessels and cargoes on the

passage of the Sound and the Great Belt was definitely ascertained. A tariff of specific duties on certain articles therein enumerated was annexed to this treaty, and it was stipulated "that goods not mentioned in the list should pay according to mercantile usage and what has been practiced from ancient times."

In 1649, the Dutch purchased the total exemption of their vessels and cargoes from the Sound duties by ten annual payments of 350,000 guilders each. This arrangement was called the redemption treaty. From the vast extent of the Dutch commerce at that period, there is no doubt this was a very favorable bargain for the republic, coupled as it was with a treaty of alliance with the crown of Denmark. Hostilities having subsequently broken out in 1652 between the Dutch and English republics, the States General demanded from Frederick III the succour stipulated by the treaty of alliance. But the Danish exchequer being found quite inadequate to answer this demand, a new arrangement was proposed by Denmark as more advantageous to herself, and perhaps equally beneficial to Holland, by which the former power engaged to keep up a fleet of twenty vessels in the Sound for the purpose of excluding the English flag from the Baltic. For the support of this squadron the States General agreed to pay an annual subsidy of 193,000 rix dollars, the redemption treaty was annulled, and the Dutch trade again subjected to the Sound duties imposed by the treaty of Christianopol.

In 1701, a treaty was concluded at Copenhagen between the two countries, by which the obscurity in that of Christianopol as to the non-specified articles was meant to be cleared up. By the third article of the new treaty it was declared that as to the goods not specified in the former treaty, "the Sound duties are to be paid *according to their value*, that is, they are to be valued *according to the places from whence they come*, and one per centum of their value to be paid."

The two treaties of 1645 and 1701, may be said to form

to this day the conventional law respecting the Danish Sound duties. They are constantly referred to in all subsequent treaties with other nations as furnishing the standard by which these duties are to be paid.

Thus by the treaty of alliance between Denmark and England of 1661 it was stipulated that British subjects should not "pay other or higher duties, than what are paid by the inhabitants of the Netherlands, or by other foreigners there trading, and who pay the lowest, *the Swedes only excepted.*"

This last exception refers to the total exemption of the Swedes from the payment of these duties by the treaty of Brömesbro' 1645, and by that of Roeskild 1658, by which last all the Danish provinces beyond the Sound were ceded to Sweden with a confirmation of their former exemption from the Sound duties. This was again confirmed by the definitive treaty of peace concluded at Copenhagen in 1660, by which the Danish government agreed to pay to Sweden the annual sum of 3,500 rix dollars out of the moneys collected at Elsinore for the light houses on the Swedish side of the Sound, whilst Sweden renounced all claim to any share in the Sound duties. The tide of fortune at last turned in favour of Denmark, and by the treaty of peace between the two crowns concluded at Stockholm in 1720, Sweden paid the penalty of the mad ambition of Charles XII, by renouncing the exemption she had enjoyed for seventy-five years, and stipulating to pay the same duties on Swedish vessels and goods as were paid by the English, Dutch, and other the most favoured nations.

In 1663 France concluded a treaty with Denmark, by which she adopted the tariff of 1645 as the rule by which the cargoes of French vessels were to pay duties on the articles specified therein; and as to non-specified articles, they were put on the footing of the most favoured nation.

This example has been followed by many other maritime states in more recent times.<sup>r</sup>

§ 20. Prison-  
ers of War.

We have already seen how the practice of maritime warfare was regulated during the period now in question. It was carried on both by public ships of war, and by privateers authorized by the commission of the belligerent sovereign, which they too often abused to plunder both friend and foe. In the mean time the establishment of permanent standing armies had contributed to systematise the operations of war by land, and in some degree to soften its horrors. With some exceptions, such as the excesses committed by the troops of Louis XIV on the invasion of Holland in 1672, the ravaging of the Palatinate by order of Louvois in 1673, and of Provence by Prince Eugene in 1707, the practices of war by land continued to improve in mildness from the age of Grotius by whom sentiments more worthy of civilized and christian nations had been earnestly inculcated. This improvement may be most distinctly and visibly traced in the treatment of prisoners of war. The custom of ransoming prisoners had succeeded during the middle age to the older practice of killing, or carrying them into captivity. The practice of enslaving prisoners of war does not appear to have been entirely abolished in the time of Grotius, whilst that of ransoming still continued, and no regular system of a general exchange during the war had yet been established. On looking into his work we find no mention of the term *cartel*, or any equivalent expression; although his translator Barbeyrac, speaking the language of the eighteenth century, introduces this term. The words of Grotius in the original text appear to be limited to the consideration of the prisoner's personal means of liberating himself so as to exclude the idea of an exchange at the public expense.<sup>s</sup> The firm esta-

<sup>r</sup> Schlegel, *Staats-Recht des Königreichs Dänemark*, p. 356-405.

<sup>s</sup> At quas apud gentes jus illud servitutis ex bello in usu non est, optimum

blishment of a systematic and public exchange was long retarded by the pecuniary interest which the private captor had acquired in his prisoners, the profits of ransom constituting the most valuable booty of war. The exact time at which the practice of exchanging was substituted for that of ransoming is not easily ascertained. It appears from a proclamation of Charles I of England issued in 1628 that it had not then completely taken place, as the individual captors are enjoined to keep the prisoners taken by privateers at sea, "at the charge of those who should bring them in, until they shall hence be delivered and sent back into their several countries, either by way of *exchange* for our subjects which shall happen to be prisoners there, or *otherwise*." It appears not improbable that this was a period of transition from the one system to the other. The expense of the captor continued, and we may infer from that his emolument also. It does not appear whether in the ambiguous practice of those times, the exchange, which sometimes took place, was effected by a regular cartel during the war, or only on the restoration of peace. In the year 1665 there is mention of a person coming to England, in a public capacity to negotiate an exchange of prisoners *flagrante bello* between that country and Holland.<sup>†</sup> It appears to have been practiced between the French and Imperial armies in Italy during the war of the Spanish succession.<sup>‡</sup> The old practice of ransoming is still referred to in a convention of cartel between France and Great Britain concluded so recently as the year 1780, in which as a sequel to an exchange of rank for rank, a money-price is establish-

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erit permutari captivos,—proximum dimitti pretio non iniquo ; hoc quale sit, præcisè definiri non potest ; sed humanitas docet non ultra intendi debere, quam deducto ne egeat captus rebus necessariis. From which it may be inferred, that the prisoner paid his own ransom. (Grotius, de J. B. ac. P. lib. iii. cap. XIV. § ix. no. 1.)

† Lettres d'Estrades, tom. iii. p. 475.

‡ Memoires de Lamberty, tom. i. p. 694.



ed ; as sixty pounds sterling for an admiral, commander in chief, and one pound for a common mariner, etc. with other intermediate prices : by which on a default of corresponding ranks, the compensation was made up by numbers of an inferior degree, or when these were all expended by a money-price.<sup>v</sup>

Such are the principal questions of international law occurring during the period we have just passed in review, and such was the progress made by that law in its practical application during the same period. We have reserved for the second part of our work the consideration of the topics relating to the rights of legation and the privileges of ambassadors, which could not well be considered in chronological order without breaking the continuity of the subject. If we appear to have bestowed an undue portion of attention upon those points which regard the law of nations in time of war, and especially those relating to maritime war, this circumstance is explained by the fact that the application of the law of nations to a state of peace furnishes fewer examples of the rules which have been generally approved in the variable practice of nations. International relations are more simple in time of peace, and naturally give rise to fewer controversies than those which concern the respective rights of belligerents and neutrals, questions respecting which have divided the opinions of public jurists during the two last centuries. These questions are of the greatest importance in a practical point of view, and many of them have not yet been resolved in a satisfactory manner so as to furnish an invariable rule to guide the conduct of all nations.

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<sup>v</sup> Robinson's Admiralty Reports, Vol. iii. App. A.

# HISTORY

## OF THE

### MODERN LAW OF NATIONS.

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#### PART SECOND.

HISTORY OF THE LAW OF NATIONS IN EUROPE FROM  
THE PEACE OF UTRECHT, 1713, TO THAT OF PARIS AND  
OF HUBERTSBURG, 1763.

THE authors of the peace of Utrecht on the part of England were driven into exile, and would have been brought to the scaffold if the malice of their enemies could have been fully gratified; but if the blessings of peace enjoyed, with little interruption, for nearly thirty years by the most civilized portion of Europe, may justly claim the gratitude of mankind, these statesmen must be considered as meriting, in the judgment of an impartial posterity, the meed of fame as the benefactors of their species. During this period the deadly feud which had so long prevailed between France and England was suspended. These two powers, from being "natural enemies," became intimate allies, and guarantees of the general tranquility of Europe, under the pacific councils of the regent Duke of Orleans and Cardinal Fleury in the one country, and of Sir Robert Walpole in the other. The last mentioned truly wise and patriotic

§ 1. Question of the Austrian succession, 1740.

minister long resisted the senseless clamour, by which the English nation was at last plunged into a maritime war with Spain in 1739, which extended to France in 1744. In the interval the powers of central Europe became involved in a continental war growing out of the disputed question of the Austrian succession. The Emperor Charles VI, the last male descendant of the house of Hapsburg, died in 1740, after having, as he fondly believed, secured the undivided inheritance of the Austrian monarchy to his daughter Maria Theresa, by the famous pragmatic sanction, accepted by the provincial states, sanctioned by the diet of the Empire, and guaranteed by nearly all the powers of Europe. The reigning houses of Bavaria, Saxony, Spain, Sardinia, and Prussia, all claimed, under various pretexts, the entire or considerable portions of the dominions which had so long been united under the Austrian sceptre. France had applied in the preceding century the balancing principle to check the undue aggrandizement of the House of Austria. The same principle was turned by Europe against France to resist the aggressions of Louis XIV. The peace of Utrecht had definitively settled the existing state of possession with a view to the balancing system, and one of the essential elements of that settlement was the integrity of the dominions of the house of Austria, to whom the possession of Belgium was guaranteed as a perpetual barrier for the United Provinces against France. France had guaranteed the pragmatic sanction of Charles VI, but the fulfilment of this guarantee was evaded upon the frivolous pretext that it reserved the rights of third parties.<sup>a</sup> She

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<sup>a</sup> Cardinal Fleury at first hesitated and temporized, but at last was borne along by the court faction which clamoured for war with Austria. He even condescended to become the interpreter of their sentiments in a letter to Frederic II of Prussia. "Le cardinal s'ouvrit davantage dans sa réponse; il y dit sans détour: 'Que la garantie de la pragmatique sanction que Louis XV avoit donnée à feu l'Empereur ne l'engageoit à rien, par ce correctif *sauf les droits d'un tiers*: de plus que feu l'Empereur n'avoit pas accompli l'article principal de ce traité, par lequel il s'étoit chargé de pro-

now placed herself at the head of a coalition, as impolitic as it was unjust, by which the greater part of the Austrian dominions were to be partitioned between Bavaria, Saxony, Prussia, and Spain.

The parties to this league had not the same motives to justify or excuse their disregard of the rights and wishes of the inhabitants of the countries they adjudged to themselves as were plausibly alleged by the authors of the treaties for the partition of the dominions of the Spanish monarchy at the beginning of the same century. These treaties were made to preserve, this to disturb the balance of Europe. Frederic II, in his memoirs, takes but little pains to justify his claim to the Silesian duchies in point of right; but rests his attack upon Austria in 1740 upon those motives which military conquerors usually deem sufficient to warrant their successful acts of aggression.

In his *Anti-Machiavel*, Frederick had stated the grounds upon which a sovereign might justly engage in war, in a manner which does equal honour to his head and heart.

Anti-Ma-  
chiavel of  
Frederick II.

"It is the object of the war which renders it just or unjust. The passions and ambition of princes often dazzle their vision and paint in the most alluring colours the most violent actions. War is a resource in extremity, and is to be resorted to with caution and only in cases admitting of no other remedy. Princes ought therefore to search their hearts in order to determine whether they are moved by the suggestions of pride and ambition or by solid reason.

"Defensive wars are doubtless the most just.

"There are wars of interest, which sovereigns are compelled to undertake in order to vindicate their just rights. In this case arms must decide the validity of the reasons alleged.

“ There are wars of precaution, which princes act wisely in undertaking. These are certainly offensive wars, but they are not the less just on that account. Where the excessive aggrandizement of one power threatens to overwhelm all others, it is the part of wisdom to oppose barriers to its encroachments whilst there is yet time to stay the torrent. The clouds are seen to gather, the lightning announces a coming storm, and the sovereign, who is unable to contend against the tempest, will, if he is wise, unite himself with all those who are menaced by the same common danger. Had the kings of Egypt, Syria, and Macedonia confederated together against the Roman power, they would not have fallen under its oppressive yoke ; an alliance prudently contested, and a war carried on with energy would have saved the ancient world from universal despotism.

“ It is the part of prudence to prefer lesser evils to greater, and to choose a certain rather than an uncertain course of policy. A prince will therefore act more wisely to engage in an offensive war, while he has yet the option between the olive branch and the laurel, than to await an open declaration of war, which may leave him without the means of effectual resistance. It is a sure maxim that it is better to anticipate others, than to be ourselves anticipated ; of which great men have constantly availed themselves by exerting their strength whilst it is yet entire, thus anticipating the designs of their enemies, before they have been carried into execution.

“ Many princes have been involved in war by treaties of alliance, obliging them to furnish a certain proportion of auxiliary forces. As no sovereign in Europe is sufficiently powerful to dispense with the aid of others, these treaties of alliance are formed for the purpose of mutual support in case of need. The event decides which of the two allies derives the greatest advantage from the compact. A fortunate conjuncture favors one of the contracting parties at one time, a different state of circumstances is advantageous to

the other party, at another. Probity and worldly wisdom, both equally require that princes should religiously observe the faith of treaties, that they should scrupulously fulfil them, the more so as they thereby secure a more efficacious protection to their subjects.

“Every war, then, which has for its exclusive object to repel usurpation, to maintain legitimate rights, to guarantee the freedom of the universe, and to avert the design of ambition, is a just war. The sovereign who undertakes such a war, cannot reproach himself with the blood which may be shed in the contest. He acts from uncontrollable necessity, and under such circumstances, war is a less evil than peace.

“But war, in general, brings with it so many calamities, its issue is so uncertain, and its consequences are so ruinous to a country, that princes cannot sufficiently reflect before they resort to this extremity. The ravages committed by their troops in the enemy’s country are nothing in comparison with the calamities war entails upon the state by which it is undertaken. It is therefore the more extraordinary that so many sovereigns engage rashly in this dreadful alternative.

“I am persuaded that if monarchs could present to themselves a true and faithful picture of the calamities inflicted upon a nation by a single declaration of war they would not be insensible to the impression. It is indeed hardly possible that they should form an adequate conception of evils from which their lot exempts them. How can they feel the weight of taxation, by which the people are oppressed? the loss of youthful population inflicted by the recruiting system? the contagious diseases by which whole armies are swept away? the horrors of battles and sieges still more horrible? the desolation of the wounded, deprived of those limbs on which depend their means of subsistence? of the widows and orphans, who have lost, by the death of their husbands and fathers, their sole support? the

destruction of so many useful citizens, prematurely mowed down by the scythe of death in the flower of their age!

"Princes, who ought only to live to reign for the benefit of mankind, should reflect well before exposing them, for frivolous and vain causes, to the most dreadful sufferings of which human nature is capable.

"Sovereigns who regard their subjects as slaves may risk their existence without pity, and see them perish without regret; but princes who consider their fellow men as their equals, and the people as the body of which they are the soul, should be sparing of the blood of their subjects."<sup>b</sup>

These sentiments, worthy of a Fenelon in the benevolent spirit they breathe, and at the same time not too refined to be capable of practical application by the ruler of a state, did not prevent Frederick from reviving an antiquated claim of the house of Brandenburg to several duchies in Silesia which had been in the undisputed possession of Austria ever since the peace of Westphalia. In vain did Austria set up the guaranty of the pragmatic sanction by his father Frederick William I. He alleged that the guaranty was conditional, and that the condition had never been performed. His real motives are avowed in his private correspondence, which discloses the love of glory, ambition, the desire of employing the army and treasure his father had bequeathed to him, in the aggrandizement of Prussia, as the secret springs by which he was moved.<sup>c</sup> His ostensible

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<sup>b</sup> Oeuvres de Frederic II, tom. ii p. 155. edit. Berlin, 1789.

It is well known that the *Anti-Machiavel* was revised and corrected by Voltaire, who published the first edition, in which he took the liberty of making several material alterations, which the author subsequently disavowed. On comparing the passage cited in the text from the edition of the works of Frederick "du vivant de l'auteur," with the 26th chapter of the edition of the *Anti-Machiavel* published in 1834 by my learned friend Dr. Friedlaender, from an original manuscript in the handwriting of Frederick, I do not find any material variation in the thoughts, though the style is much less pure and correct in this last mentioned edition.

<sup>c</sup> Oeuvres posthumes, tom. viii. pp. 154, 155, 161—164, 210. Correspondance avec Jordan.

claim was to four duchies, and he seized the whole province. Having secured his conquest, Frederick immediately abandoned his allies, upon pretexts which are equally inconsistent with the sound principles laid down in the above commentary upon Machiavel, of fidelity to an ally even when the contract turns out exclusively to his advantage. Silesia was ceded to Prussia, by the treaty of Breslau, confirmed by that of Dresden, in 1745; and Frederick left France and his other allies to fight it out with Austria. But the elector of Bavaria, who had been chosen emperor under the title of Charles VII, having died in the same year, his son and successor renounced his pretensions to the imperial dignity, as well as to the hereditary states of Austria, and a general peace was at last concluded at Aix la Chapelle, in 1748, by which the former state of possession established by the treaties of Westphalia and Utrecht was confirmed, except the cession of Silesia to Prussia, and of the duchies of Parma and Guastalla to the Infant Don Philip. The pragmatic sanction of Charles VI, and the succession of the house of Hanover to the British throne, were also recognized by the peace of Aix la Chapelle, which was based upon the *Status quo ante bellum*, excepting the territorial cessions by Austria. It left Austria still a first rate power, whilst it raised Prussia, with unequal forces to the same rank.

The peace of Aix la Chapelle planted the seeds of another war between France and Great Britain, which broke out in 1756, upon a question of the disputed boundaries between their respective territories in North America. The British made reprisals upon the French commerce at sea, before the actual declaration of hostilities, upon the ground that the hostile movements of the French forces and their allies the Indians on their frontiers of Canada constituted a previous aggression.<sup>d</sup> George II formed,

§ 2. Seven years war.

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<sup>d</sup> In the celebrated report of the English civilians made in 1753, upon



in January, 1756, a defensive alliance with Prussia for the preservation of the existing peace, the mutual guaranty of Hanover and Silesia, and against the entrance of foreign troops into Germany. This mutation in the continental alliances of Great Britain produced a correspondent change in the federative system of France. She formed, in the month of May, in the same year, a defensive alliance with Austria, which was converted into an alliance offensive and defensive in 1758. Frederick commenced the seven years war by invading Saxony, and on his arrival at Dresden, found in the electoral archives, documents, which he published as proofs that the courts of Vienna, Dresden, and Petersburg, had concerted a plan for the invasion and partition of the Prussian monarchy.<sup>e</sup> But the Count de Hertzberg, his confidential minister, in a memoir read before the Academy of Berlin, in 1787, admits that this plan was only eventual and presupposed that the king of Prussia should become the aggressor; that it was at least possible that the plan would never have been executed, and problematic whether the peril of this contingency would have been greater than that of provoking a war by which the national existence of Prussia was put at hazard.<sup>f</sup> On the other hand, from the very valuable collection of state papers relating to the times of Frederick II, recently published by Mr. Von Raumer, it results in the opinion of that author :

1. That Frederick has not proved, and could not prove that a formal offensive alliance against him had been concluded between Austria, Russia, and Saxony.

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the case of the *Silesian loan*, it is stated that in the maritime war terminated by the peace of Aix la Chapelle, French ships and effects wrongfully taken *after* the Spanish war, and *before* the French war were, *flagrante bello*, restored to the French owners, because had it not been for the wrong first done, these effects would not have been within the British territory. (Martens, *Causes célèbres*, tom. ii. p. 72.)

<sup>e</sup> Hertzberg, *Recueil des Deductions*, etc. tom. i. p. 1.

<sup>f</sup> Schoell, *Histoire abrégée des Traités de Paix*, tom. iii. p. 28.

2. But the designs of these powers were unquestionably hostile. Austria cherished the natural wish to reconquer Silesia, and provoked Frederick to attack in order to avail herself of the aid of Russia and France for this end.

3. The king was aware of this danger, but he nevertheless drew on himself the appearance of being the aggressor, because he was impressed with the conviction that he could not escape entire ruin except by anticipating the designs of his enemies. He professedly acted in self-defence according to the principle of his declaration to the British minister "that he who gave the first blow was not to be considered as the aggressor, but he that made that blow necessary and unavoidable."<sup>s</sup>

The peace of Utrecht studiously aimed to separate forever, the crowns of France and Spain. The family compact of 1761, sought again to reunite the two branches of the house of Bourbon, and to realize the prediction of Louis XIV, that there should be no more Pyrénées. By this treaty, concluded between the crowns of France and Spain, the two powers formed a perpetual alliance offensive and defensive, guarantying mutually their respective possessions, and agreeing on the conclusion of peace, to compensate the advantages which one party might obtain, with the losses sustained by the other. Spain became thus involved in the war between her ally and Great Britain and Portugal. The combined naval forces of France and Spain proved inadequate to cope with those of Great Britain, and the maritime war was terminated by the peace of Paris, in 1763. By this treaty France lost all her remaining possessions on the North American continent, Louisiana having been previously ceded to Spain by a secret treaty, as an indemnity for Florida, which Spain ceded to Great Britain by the treaty of Paris. France also ceded Grenada and several other West India Islands to her rival,

§ 3. Peace  
of Paris and  
Hubertsburg.

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<sup>s</sup> Von Raumer, Frederick II, and his Times, pp. 277, 294.

and renounced all her acquisitions in Hindostan made since the year 1749. The naval ascendancy of Great Britain was thus confirmed, and the maritime and colonial balance of power completely destroyed.

The continental war was simultaneously terminated by the peace of Hubertsburg between Austria and Prussia which confirmed to the latter the possession of Silesia. The treaties of Paris and Hubertsburg revived and confirmed the treaties of Westphalia, Utrecht, and Aix la Chapelle. The seven years war by land and sea, was thus terminated, after an immense waste of blood and treasure, without any material change in the previous state of possession, except the colonial acquisitions made by Great Britain, at the expense of France and Spain.

Though the seven years war was thus terminated without any material change in the international relations of the states of Central and Southern Europe in respect to territorial possession, yet it marks the era of a very important alteration in the relative power and influence of the principal European nations, the effect of which is felt even at the present time.

1. The rank acquired by Prussia as a first rate power by the development of its military resources in the conquest of Silesia, and the brilliant genius displayed by its great monarch, in a protracted and unequal struggle with the combined forces of Austria, France, and Russia, was confirmed by the peace of Hubertsburg. A Protestant power arose in Germany adequate to balance the influence of Austria as a Catholic power, in the affairs of the empire, and to neutralize the effect of the Austrian alliance with France. The seven years war was not a war of religion, but it was the last war waged in Europe in which religious feeling mingled with a struggle for political ascendancy. The protestant peasantry of Silesia received Frederick as a deliverer, whilst the standards of Marshal Daun were consecrated by the pope. The triumph of Prussia was felt

to be the triumph of Protestantism, notwithstanding the indifference of her philosophic king.<sup>b</sup>

2. Russia now first took an active part in the affairs of central Europe. Under Czar Peter I, from a mere Asiatic, she became a European state, and from an inland, a maritime power. The treaty of Neustadt in 1721, annexed the provinces of Sweden, on the eastern shores of the Baltic, Livonia, Esthonia, and Ingria, to the Russian empire, which had gained by conquest a vast extent of territory, and not less than ten millions of population from the accession of Peter I, in 1689, to that of Catherine II, in 1762.

3. Besides the above cessions to Russia of territory equal to the whole extent of the present kingdom of Sweden, the latter power had been compelled to cede her German provinces of Bremen and Verden, to Hanover, with a part of Pomerania to Prussia. Sweden thus became impoverished and weakened, and lost her influence in Germany with that rank in Europe she had held ever since the thirty years war.

4. Spain, from being the first military and naval power in Europe, under Charles V and Philip II, though she still retained her immense colonial possessions, had fallen to the rank of a second rate power, the subordinate ally of France.

5. Holland remained neutral during the war of 1756, and thus concealed the secret of her internal decline, which was completely disclosed during the subsequent war of the American Revolution, when she fell into that subordinate rank she has ever since continued to occupy.

The period we are now reviewing was fruitful in exponents of the science created by Gentili and Grotius, cultivated with unequal success by Puffendorf, and transmitted to a long succession of public jurists, bred in the schools of Germany and Holland.

Public jurists of this period.

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<sup>b</sup> Hegel, *Philosophie der Geschichte*, herausgegeben von Gans, § 434.

§ 4. System  
of Wolf.

Christian Frederick Von Wolf, born in 1679, at Breslau in Silesia, was a disciple of Leibnitz in philosophy and in jurisprudence. His youth was devoted almost exclusively to mathematical studies, which he pursued at the university of Jena, and afterwards taught at Leipzig with eminent success. He was subsequently named professor at Halle on the recommendation of Leibnitz, where he taught the dogmatic philosophy of his great master, and contributed to popularize it, by giving instruction in the German language. He became the victim of theological hatred and calumny and was arbitrarily banished from the Prussian dominions on a charge of infidelity by king Frederick William I, in 1723.<sup>1</sup> On the accession of Frederick II to the throne in 1740, Wolf was recalled from banishment and restored to his professor's chair. He died in 1754, at the age of seventy-six years, after having contributed to prolong the reign of the Leibnitzian philosophy in Germany until it was finally overthrown by the system of Kant. "He was a man of little genius, originality, or taste, but whose extensive and various learning seconded by a methodical head, and by an incredible industry, and perseverance, seems to have been peculiarly fitted to command the admiration of his countrymen."<sup>2</sup>

The public jurists of the school of Puffendorf had con-

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<sup>1</sup> The following anecdote on this subject is told by Euler: "Lorsque du temps du feu roi de Prusse, M. Wolf enseignoit à Halle le système de l'harmonie préétablie, le roi s'informa de cette doctrine qui faisoit grand bruit alors; et un courtisan répondit à Sa Majesté, que tous les soldats, selon cette doctrine, n'étoient que des machines; et quand quelques uns désertoient, que c'était une suite nécessaire de leur structure et qu'on avoit tort par conséquent de les punir, comme on l'auroit si on punissoit une machine pour avoir produit tel ou tel mouvement. Le roi se facha si fort sur ce rapport, qu'il donna ordre de chasser M. Wolf de Halle sous peine d'être pendu s'il s'y trouvoit au bout de 24 heures." (Lettres à une Princesse d'Allemagne, Lettre 84 me.)

<sup>2</sup> Stewart's Dissertation on the Progress of Methaphysical and Ethical Philosophy, p. 188.

sidered the science of international law as a branch of the science of ethics. They had considered it as the natural law of individuals applied to regulate the conduct of the independent societies of men called States. To Wolf belongs, according to his elegant abridger Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats of the duties of individuals. He commenced his labours in this field of science by the composition of an immense work comprising the distinct sciences of natural jurisprudence and international law which was published at different intervals from 1740 to 1748 in nine ponderous tomes.<sup>1</sup> This work, like the other philosophical writings of the author, is marked by an injudicious attempt to apply the phraseology and forms of mathematics to moral sciences which do not admit of this strict method of reasoning. In 1749, he published an abridgment of his great work under the title *Jus Gentium methodo scientifica pertractatum, in quo jus gentium naturale ab eo quod voluntarii, pactitii et consuetudinarii est, accurate distinguitur*. It is not easy to infer from this title precisely what the author understood to be comprehended under the term *voluntary* law of nations, as distinguished from the *conventional* and *customary* law of nations. Grotius had used the term *jus voluntarium gentium* in a comprehensive sense as including all those foundations of international law which could not properly be referred to the law of nature, but depended upon the voluntary consent of all or many nations:—"quod gentium omnium aut multarum voluntate vim obligandi accepit." (De J. B. ac P. lib. i. cap. i. sect. 14.) Wolf says, in the preface of his work, (sect. 3.) "that since such is the condition of mankind that the strict law of nature cannot always be applied to the government of a particular community, but it becomes necessary to re-

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<sup>1</sup> Christiani Wolfii Jus Naturæ methodo scientifica pertractatum in ix. tomos distributum.

sort to laws of positive institution more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it, than they are bound to submit to the natural law itself, and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law we have deemed proper to term with Grotius, though in a somewhat stricter sense, the voluntary law of nations."<sup>m</sup>

Wolf afterwards says (Proleg. sect. 25.) that "the voluntary law of nations derives its force from the presumed consent of nations, the conventional from their express consent; and the consuetudinary from their tacit consent."

This presumed consent of nations (*consentium gentium præsumptum*) to the voluntary law of nations he derives from the fiction of a great commonwealth of nations (*civitate gentium maxima*) instituted by nature herself, and of which all the nations of the world are members. As each separate society of men is governed by its peculiar laws freely adopted by itself, so is the general society of nations governed by its appropriate laws freely adopted by the se-

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<sup>m</sup> Quem ad modum ea est hominum conditio, ut in civitate rigori juris naturæ per omnia ex æsse satisfieri non possit, ac propterea legibus positivis opus sit, quæ neque in totum a naturali jure recedunt, nec per omnia ei servant; ita similiter gentium ea est conditio, ut rigori juris gentium naturali per omnia ex æsse satisfieri nequeat, atque ideo jus istud in se immutabile tantisper immutandum sit, ut neque in totum a naturali recedat nec per omnia ei serviat. Quoniam vero hanc ipsam immutationem ipsa gentium communis salus exigit, ideo quod inde prodit jus, non minus gentes inter se admittere tenentur, quam ad juris naturalis observantiam naturaliter obligantur, et non minus istud quam hoc salva juris consonantia pro jure omnium gentium communi habendum. Hoc ipsum autem jus cum Grotio, quamvis significatu prorsus eodem, sed paulo strictiori *jus gentium voluntarium* appellare libuit. (Wolffius, ib.)

veral members on their entering the same. These laws he deduces from a modification of the natural law so as to adapt it to the peculiar nature of that social union which (according to him) makes it the duty of all nations to submit to the rules by which that union is governed, in the same manner as individuals are bound to submit to the laws of the particular community of which they are members. But he takes no pains to prove the existence of any such social union, or universal republic of nations, or to show when or how all the human race became members of this union or citizens of this republic. According to strict logic, (as we have already seen,) a law is a rule of conduct prescribed by a superiour or superiours to those who are subject to his or their authority. Such is the law of nature, more properly called the law of God, or the divine law; and such are political, human laws, prescribed by political superiours to persons in a state of subjection to their authority. But the laws which regulate the conduct of independent political societies towards each other are styled such by an analogical extension of the term, being imposed upon nations or sovereigns, not by the positive command of a superiour authority, but by opinions generally current among nations. The duties imposed by what is termed the law of nations, by its analogy to positive law, are enforced by moral sanctions: by fear on the part of nations or sovereigns, of provoking general hostility, and incurring its probable evils in case they should violate maxims generally received and respected.<sup>a</sup>

And a modern commentator upon Grotius, states that this public jurist had considered the law of nations as a system of rules deriving its authority from the positive consent of all or of most nations. He first considers the several societies of the world as so many collective persons who are formed into one great society including all man-

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<sup>a</sup> Ante, part first, § 5.



kind ; and then he supposes the law of nations to be the dictate of the common will of this great body ; in the same manner as the civil law of each distinct civil society is the dictate of the common will of these smaller bodies.<sup>o</sup>

“ But,” (says his commentator,) “ when there is no common superiour who has authority over the whole, the general body of the society taken together is superiour to each of the members taken separately, and has authority to prescribe laws to each. This authority in a society of equals arises from their social union, that is from the compact by which they have bound themselves to act for some common purpose under the direction of the common understanding. But there is no such voluntary union among the several nations of the world, and consequently there is no legislative power among them competent to establish positive laws.”<sup>p</sup> He concludes that the same law which is called the law of nature when applied to separate and unconnected individuals becomes the law of nations when it is applied to the collective bodies of civil societies, considered as moral agents, or to the several members of civil societies, considered, not as distinct agents, but as parts of these collective bodies. At the same time he admits that the natural law is not the only measure of the obligations that nations may be under to one another. When considered as moral agents, they become capable, as individuals are, of binding themselves to each other by particular compacts to do or avoid what the law of nature has neither commanded nor forbidden. But these obligations neither arise from a positive law of nations, nor produce such a law. They arise from an immediate and direct consent, and extend no farther than to the nations, which by their own act of immediate and direct consent have made themselves parties to them. The only foundation then, accord-

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<sup>o</sup> Grotius, de J. B. ac P. lib. i. cap. i. § 14.

<sup>p</sup> Rutherford, Institutes of Natural Law, b. ii. ch. ix. § 1. London, 1754.

ing to this writer, of international law, so far as it differs from the law of nature, is the general consent of mankind to consider each separate civil society as a distinct moral being. He contends that no evidence of a positive international law can be collected from usage, because there is no immemorial, uniform, constant practice among nations from which such a law can be collected. But if the law of nations, instead of being merely positive, is only the law of nature applied in consequence of a positive agreement among mankind to the collective bodies of civil societies as moral agents, and to the several members of such societies as parts of these bodies, the dictates of this law may be ascertained by the same means that we use in searching for the law of nature. The history of what has passed, from time to time, among the several nations of the world may likewise be of some use in this inquiry : not because any constant and uninterrupted practice in matters which are indifferent can be collected from thence ; but because we shall then find what has been generally approved and what has been generally condemned in the variable and contradictory practice of nations. " There are two ways," says Grotius (lib. i. cap. i. s. xii.) " of investigating the law of nature : we ascertain this law, either by arguing from the nature and circumstances of mankind, or by observing what has been generally approved by all nations. The former is the more certain of the two : but the latter will lead us, if not with the same certainty, yet with a high degree of probability to the knowledge of this law. For such a universal approbation must arise from some universal principle ; and this principle can be nothing else but the common sense or reason of mankind. Since, therefore, the general law of nature may be investigated in this manner, the same law as it is applied particularly to nations as moral agents, and hence called the law of nations, may be investigated in the the same manner." Hence his commentator infers that if we understand what the law of nature is, when it is applied to individual persons in a state of natural equality, we

shall seldom be at a loss to judge what it is, when applied to nations considered as collective persons in a like state of equality. Thus the same law, which is called the law of nature, when applied to separate and unconnected individuals, is called the law of nations when applied to the collective bodies of civil societies considered as moral agents, or to the several members of civil societies considered, not as distinct agents, but as parts of these collective bodies.<sup>9</sup>

Wolf supposes himself to differ from Grotius as to the origin of the voluntary law of nations in two particulars :

1. That Grotius considered it as a law of positive institution, and rested its obligation upon the general consent of nations as evidenced in their practice. Wolf, on the other hand, considers it as a law which nature has imposed upon all mankind as a necessary consequence of their social union ; and to which no one nation is at liberty to refuse its assent.

2. That Grotius confounds the voluntary law of nations with the customary law of nations, from which it differs in this respect that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations among whom it has been established from long usage and tacit consent.

From the materials furnished by Wolf, was constructed the treatise of Vattel :—" a diffuse, unscientific, but clear and liberal writer, whose work still maintains its place as the most convenient abridgment of a part of knowledge which calls for the skill of a new builder."<sup>r</sup>

§ 5. Vattel, b.  
1714, d. 1767.

Vattel was born in 1714 in the principality of Neuchâtel in Switzerland. He was educated in the university of Basle, and being destined for the church devoted himself to the studies appropriate to that profession. He subsequently abandoned this pursuit for the study of philosophy,

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<sup>9</sup> Rutherford, *Institutes of Natural Law*, b. ii. ch. ix. § i. London, 1754.

<sup>r</sup> Macintosh.

having conceived a passionate admiration for the reigning system of Leibnitz and Wolf. He published at Geneva in 1741 a defence of the metaphysical philosophy of Leibnitz against the attack made on it by Crousaz, a work which attracted considerable attention as containing an acute discussion of the question relating to the freedom of the human will. In the same year he repaired to Berlin to seek employment in the service of the philosophical monarch who had just mounted the throne, and of whom Vattel was born a subject. Failing in his application at the Prussian court, he proceeded to Dresden, where he was more successful, having been appointed in 1746 a counsellor of embassy, and sent as minister of Augustus III, king of Poland and elector of Saxony, to the republic of Berne. He employed the leisure left him by his public duties in the composition of his treatise on the law of nations which was first published at Leyden in 1758.\* In the same year he was recalled from his mission, and employed in the cabinet of Saxony until 1766, when he obtained leave to retire to his native country, where he died in 1767.

Vattel attributes to Wolf the honour of having first completely separated the law of nations from that part of the science of natural jurisprudence which treats of the duties of individuals, by showing how the natural law becomes modified in its application to regulate the conduct of nations or sovereign states." "Being myself convinced," says he, "of the utility of such a work, I awaited with impatience the pub-

System of  
Vattel.

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\* *Le droit des Gens, ou Principes de la Loi Naturelle appliqués à la conduite des Nations et des Souverains à Leyde, 1758.* A second edition was published at Neuchâtel, after the death of the author in 1773, in two volumes, quarto, from a MS. containing several marginal additions. This edition is full of typographical errors, and leaves the original text unchanged, the author's augmentations being published in the form of notes in all subsequent editions. In 1762, he published *Questions du Droit naturel, ou observations sur le traité du Droit de la Nature par M. Wolf.*

lication of that of M. Wolf, and as soon as it appeared I conceived the plan of facilitating to a greater number of readers the acquisition of the luminous ideas it contains. The treatise of the philosopher of Halle is connected with the other works of the same author upon philosophy and natural law. To read and understand it, it is necessary to have previously studied sixteen or seventeen volumes in quarto which precede it. Besides it is written in the method and with the forms of works of geometry; which present so many obstacles, rendering this treatise almost entirely useless to those persons to whom the knowledge of the true principles of the law of nations is the most desirable. I at first thought that I should only have to detach, as it were, this treatise from the entire system of M. Wolf, and clothe it in a more agreeable dress, more suitable to ensure it a reception in the polite world. I made several attempts with this view; but I soon found that if I wished to secure readers among that class of persons for whose instruction I intended to write, and to produce good fruit, I ought to compose an original work very different in its character from that before me. The method pursued by M. Wolf has rendered his work dry, and at the same time incomplete in several respects. The subject matters are distributed in a manner which fatigues the attention of the reader; and as the author had already treated of universal public law in his work on the law of nature, he frequently refers to it where he has occasion to speak of the duties which a nation owes to itself.

“I have therefore contented myself with selecting from the work of M. Wolf the best parts, especially the definitions and general principles; but I have used with discrimination the materials thus chosen, and have accommodated them to my own plan. Those who have read the treatises of natural law and the law of nations by M. Wolf will perceive how far I have availed myself of these works. If I had every where noted all I have borrowed, my pages would have been loaded with citations equally useless and

disagreeable to the reader. It is therefore better here to acknowledge, once for all, my obligations to this great master. Although my work is very different from his, as those who will take the trouble to make the comparison will perceive, I willingly acknowledge that I should never have had the courage to enter on so vast an undertaking if the philosopher of Halle had not gone before and lighted my path."<sup>t</sup>

The following comparative table will enable the reader to judge for himself how far Vattel has borrowed not only the materials, but the order and arrangement of his work from that of Wolf :

<i>Wolf.</i>	<i>Vattel.</i>
1 Chapter.	1 Book.
2 Chapter.	2 Book, chap. 1—5.
3 Chapter.	" " " 7—11,
4 Chapter.	" " " 12—17.
5 Chapter.	" " " 18.
6 Chapter.	3 Book, chap. 1, 2.
7 Chapter.	" " " 3—18.
8 Chapter.	4 Book, chap. 1—4.
9 Chapter.	" " " 5—9.

As the first chapter of Wolf, *De Officiis gentium erga seipsas et inde nascentibus juribus*, so is the first book of Vattel, *De la Nation considérée en elle même*, taken up with the discussion of topics belonging not to international law, but to the distinct science of political or constitutional law concerning the internal government of particular states. This division of his subject occupies at least one-third of Vattel's entire work. In that part of it which relates to the law of nations properly so called, he differs from Wolf in the manner of establishing the foundations of the voluntary law of nations. Wolf deduces the obligation of this law, as we have already seen, from the fiction of a great

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<sup>t</sup> Vattel, *Droit des Gens*, Préface.

republic instituted by nature herself, and of which all the nations of the world are members. According to him, the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy Vattel. "I do not find," says he, "the fiction of such a republic either very just, or sufficiently solid to deduce from it the rules of a universal law of nations necessarily admitted among sovereign states. I do not recognize any other natural society between nations than that which nature has established between all men. It is the essence of all civil society (*civilitatis*) that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable of commanding all the members, of giving to them laws, and of punishing those who refuse to obey. Nothing like this can be conceived or supposed to exist between nations. Each sovereign state pretends to be, and in fact is independent of all others. Even according to M. Wolf, they must all be considered as so many free individuals, who live together in a state of nature, and acknowledge no other law than that of nature itself and its divine author."<sup>u</sup>

According to Vattel, the law of nations, in its origin, is nothing but *the law of nature applied to nations*.

Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied being different, the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or states. A state is a very different subject from a human individual, from which result, in many cases, obligations and rights very different. The same general rule applied to two subjects cannot produce the same decisions where the subjects themselves differ. There are consequently many cases in

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<sup>u</sup> Vattel, *Droit des Gens*, Préface.

which the natural law does not furnish the same rule of decision between state and state as would be applicable between individual and individual. It is the art of accommodating this application to the different nature of the subjects in a just manner according to right reason which constitutes the law of nations a particular science.

This application of the natural law to regulate the conduct of nations in their intercourse with each other constitutes what both Wolf and Vattel term the *necessary law of nations*. It is *necessary*, because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon states as upon individuals, since states are composed of men, and since the natural law binds all men in whatever relation they may stand to each other. This is the law which Grotius and his followers call the *internal law of nations*, as it is obligatory upon nations in point of conscience. Others term it the *natural law of nations*.

This law is immutable, as it consists in the application to states of the natural law, which is itself immutable, being founded on the nature of things and especially on the nature of man.

This law being immutable, and the law which it imposes necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.<sup>v</sup>

<sup>v</sup> Droit des Gens, Préliminaires, §§ vi. vii. viii. ix.

These definitions call to mind that splendid fragment of Cicero, *De Republica*, so often quoted, in which he describes the attributes of the natural law. "Est quidem vera lex, recta ratio naturæ congruens diffusa in omnes, constans, sempiterna. \* \* \* Huic legi neque abrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest. Nec vero aut per senatum, aut per populum, solvi hac lege possumus. Neque est quærendus explanator aut interpret ejus alius. Nec erit alia lex Romæ alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immortalis continebit, unusque erit communis



This chain of definitions, propositions, and corollaries might suggest more than one objection, if our present object were not rather to *state*, than to *criticise* the fundamental principles on which the obligation of international law is rested by Vattel and his master. The former has himself anticipated one objection to his doctrine that states cannot change the necessary law of nations by their conventions with each other. This objection is, that it would be inconsistent with the liberty and independence of a nation to allow to others the right of determining whether its conduct was, or was not, conformable to the necessary law of nations. He obviates the objection by a distinction which pronounces treaties made in contravention of the necessary law of nations to be invalid according to the *internal* law, or that of conscience, at the same time that they may be valid by the *external* law: states being often obliged to acquiesce in such deviations from the former law in cases where they do not affect their perfect rights.\*

From this distinction of Vattel flows what Wolf had denominated the *voluntary law of nations*, (*jus gentium voluntarium*), to which term his disciple assents, although he differs from Wolf as to the manner of establishing its obligation. He however agrees with Wolf in considering the voluntary law of nations as a positive law derived from the presumed consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the supreme ruler of the universe.

Besides this voluntary law of nations, these writers enumerate two other species of international law. These are :

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quasi magister et imperator omnium Deus. Ille legis hujus inventor, deceptor, lator, cui qui non parebit ipse se fugiet et naturam hominis aspernabitur, atque hoc ipso luet maximas penas etiam si cætera supplicia que putantur effugerit." (Fragm. lib. iii. de Repub.)

\* Droit des Gens, Préliminaires, § ix.

1. The *conventional* law of nations, resulting from compacts between particular states. As a treaty binds only the contracting parties, it is evident that the conventional law of nations, is not a universal, but a particular law.

2. The *customary* law of nations, resulting from usage between particular nations. It is not universal, but binding upon those states only which have given their tacit consent to it.

Vattel concludes that these three species of international law, the *voluntary*, the *conventional*, and the *customary*, compose together the *positive law of nations*. For they proceed from the will of nations ; (or in the words of Wolf,) " the *voluntary*, from their presumed consent ; the *conventional*, from their express consent ; and the *customary*, from their tacit consent."<sup>x</sup>

It is almost superfluous to point out the confusion in this enumeration of the different species of international law, which might easily have been avoided by reserving the expression of voluntary law to designate the *genus*, including all the rules of international law introduced by positive consent, and divided into the two *species* of conventional law and customary law, the former being introduced by treaty and the latter by usage between nations.<sup>y</sup>

In the same year (1748) with Vattel's treatise appeared the *Esprit des Lois*, a work so different in character from that of the public jurists formed in the school of Grotius and Puffendorf, that it has been supposed to have given the first fatal blow to the study of natural jurisprudence which had so long engrossed the attention, not only of the scholars, but the statesmen of Europe. Montesquieu still merits and enjoys the reputation of having invented " the grand idea of connecting jurisprudence with history and philosophy in such a manner as to render them all subservient

1758?  
§ 6. Montesquieu, b. 1689, d. 1755.

<sup>x</sup> Droit des Gens, Préliminaires, § xxvii. Wolf, Proleg. § xxv.

<sup>y</sup> Vattel, Droit des Gens, edit. de M. Pinheiro Ferreira, tom. iii. p. 22.

to their mutual illustration.”\* His genius may have been kindled with the touch of emulation by the perusal of Vico, and he unquestionably borrowed many thoughts and illustrations from the works of his other predecessors, Bodin, Gravina, and Machiavelli.<sup>a</sup> But these concessions are not sufficient to detract from the merit to which he is justly entitled, in having diverted political philosophy from barren speculations, and directed it to the study of human nature ; not in the history of one or two nations of classic antiquity alone, but in the vast variety of races dispersed over the many-peopled globe, with their correspondent diversities of manners, laws, and religion. The general scope of his work did not embrace the subject of those usages which regulate the mutual intercourse of independent societies of men ; but he has deduced, in a single pregnant passage, the peculiar law of nations prevailing among different races from their peculiar moral and physical circumstances, in the same deep philosophical spirit with which he traces the origin and history of the civil laws of different nations.

“ Le droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu’il est possible, sans nuire à leurs véritables intérêts.

“ L’objet de la guerre, c’est la victoire : celui de la victoire la conquête ; celui de la conquête la conservation. De ce principe et du précédent *doivent dériver toutes les lois qui forment le droit des gens.*”

After thus stating the principles on which the law of nations *ought to be founded*, he proceeds :

“ Toutes les nations ont un droit des gens ; *les Iroquois*

\* D. Stewart, Preliminary Dissertation on the Progress of Metaphysical and Moral Philosophy, p. 94.

<sup>a</sup> It is difficult to suppose Montesquieu to have been ignorant of the *Scienza nuova*, (which the Italians reproach him with not referring to,) since it was published at Naples in 1725, thirteen years before the *Espirit des Loix*.

*même, qui mangent leurs prisonniers, en ont un. Ils envoient et reçoivent des ambassades, ils connoissent des droits de la guerre et de la paix : le mal est que ce droit des gens n'est pas fondé sur les vrais principes."*<sup>b</sup>

The most distinguished public jurist of this period was Bynkershoek, to whose writings we have already so frequently had occasion to refer as bearing testimony to the usages and opinions of the period preceding the peace of Utrecht respecting the maritime law of nations. The earliest of his published writings, the treatise on the sovereignty of the seas, *De Dominio Maris*, also made its appearance during that period, having been published in 1702. But the greater part of his works were written and published within the period now under consideration.

§ 7. Bynkershoek, b. 1673, d. 1743.

He was born at Middleburgh, the capital of Zealand in 1673, and received his education at the university of Franeker in Friesland. His scholastic exercises while resident at this seat of learning drew upon him the attention of the celebrated professor of jurisprudence Huberus, who

<sup>b</sup> Montesquieu, *De l'Esprit des Lois*, liv. 1, ch. 3.

It is evident from the above passage that Montesquieu considered the law of nations as neither universal nor immutable. So also Grotius states "that the *jus gentium* acquires its obligatory force from the positive consent of all nations, or at least of several. I say of several, for except the natural law, which is also called the *jus gentium*, there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place in respect to prisoners of war and the *jus postliminii*." (De J. B. ac. P. lib. i. cap. i. § xiv. no. 4.) And Bynkershoek, in the passage before quoted, states that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all nations, at least certainly among the greater part, and those the most civilized." (De Foro Legatorum, cap. iii.) And Leibnitz, speaking of the voluntary law of nations introduced by the tacit consent of nations, says: "Neque vero necesse est, ut sit omnium gentium vel omnium temporum, cum in multis arbitrer aliud Indis aliud Europæis placere, et apud nos ipso sæculorum decursu mutari, quod vel hoc ipsum opus indicare potest." (Cod. Jur. Gent. Diplom. præm.)

in one of his elaborate dissertations calls him "eruditissimus juvenis Cornelius Bynkershoek." On leaving the university he settled at the Hague, where he practiced with great applause and success the profession of an advocate, and published from time to time ingenious and learned dissertations on various subjects of the Roman law and the municipal law of his own country. In the year 1702, he published his treatise *De Dominio Maris*; and the next year was appointed a judge of the court of justice, forming the supreme appellate tribunal for the provinces of Holland, Zealand, and West Friesland, which sat at the Hague. In the year 1721 he published his excellent treatise *De Foro Legatorum*, and in 1724 was appointed president of the high court of which he had so long been a distinguished member. His *Quæstiones Juris Publici* are among the last works he produced, as they did not appear until the year 1737, when he was sixty-four years old. He died in 1743 in the seventieth year of his age.

His various works were published separately in his lifetime, except the *Quæstiones Juris Privati* relating to different topics of Roman and Dutch law, which appeared only after his decease. These are only part of a larger work which he did not live to finish. He had, however, prepared the four <sup>first</sup> books for the press, when death put a period to his labours. He had not even time to write more than the first paragraph of a preface, with which he intended to usher that work into the world, and in which he appears fully sensible of his approaching end.

Eighteen years after his death, his scattered writings were collected together by the learned Vicat, professor of jurisprudence in the college of Lausanne in Switzerland, and published in two folio volumes at Geneva in the year 1761. Various editions of his separate treatises have been published at different times in Holland. But this the earliest, the best, and the most complete monument of his fame, was raised in a foreign land.

This edition, which we have constantly used in our quo-

tations, is remarkable for its beauty and correctness, and is adorned by an elegant preface by the editor, and an account of the author's life and writings.<sup>c</sup>

The earliest of his published works, the treatise *De Dominio Maris* we have already sufficiently noticed. An account of his dissertation *De Foro Legatorum* will also find its appropriate place in a succeeding section of this essay. But the most important of his works, relating to subjects of international law, is the *Quæstiones Juris Publici*, and especially the first book *De Rebus Bellicis*.

In this work, Bynkershoek treats the important subject of belligerent and neutral relations, with more completeness, precision, and fulness of practical illustration than any of his predecessors, and indeed it may be said of his successors, among the public jurists. He is the first writer who has entered into a critical and systematic exposition of the law of nations on the subject of maritime commerce between neutral and belligerent nations; and the plan which he adopted was well calculated to do justice to the subject. Instead of undertaking, after the example of Grotius and Puffendorf, an entire code of international law, he selected for a more thorough discussion the particular questions deemed most important and of most frequent occurrence in the intercourse of modern nations.<sup>d</sup>

<sup>c</sup> An elegant and accurate translation of the first book of Bynkershoek's *Quæstiones Juris Publici* into the English language was published at Philadelphia in 1810 by Mr. Duponceau, under the title of the *Law of War*, enriched with valuable notes by the learned translator. The preceding short notice of Bynkershoek's life has been taken from this work.

<sup>d</sup> *Madison's Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace*, p. 18-24, London ed. 1806.

On the subject of belligerent and neutral relations in maritime war *Grotius* has but a single and that but a short chapter (lib. iii. c. xvii.) with a short section (S. 5 c. i. of the same book, with a note, and § 10, c. 2, lib. ii. and § 6, c. vi. lib. iii. with a note.) *Vattel* is extremely deficient in fullness and precision of details on this subject. A few sections only of the 7th chapter of his Third Book, (§§ 110-117) are devoted to it, and in no

Bynkershoek has incidentally touched, in this work, as well as in his treatise *De Foro Legatorum*, the so much debated question as to the nature and foundation of the obligatory force of international law.

In treating of the question as to the competent judicature in cases affecting ambassadors and other public ministers, he says : " The ancient jurisconsults say that the law of nations (*jus gentium*) is observed, according to the light of reason, among nations, if not among all, at least among the greater part, and those the most civilized. According to my judgment we may safely follow this definition, which establishes two foundations of the law in question." \* \* \* " But in whatever manner we define the law of nations, and whatever disputes there may be respecting its proper definition, we must always come back to this conclusion, that what reason dictates to nations, and what nations observe between each other, in consequence of comparing those cases which have most frequently occurred in their mutual intercourse, is the only law binding on those who have no other. If all men are men, that is if they make use of their reason, reason must counsel and command certain things which they ought to observe as by mutual consent, and which being ultimately established by usage, impose upon nations a reciprocal obligation ; without which neither war, nor peace, nor alliances, nor commerce can be conceived."<sup>e</sup>

Again, treating the same question, he says : " We can hardly here derive any light either from the civil law or from the canon law : the whole question depends upon reason and the usage of nations. I have already stated what may be alleged for and against it following the guidance of reason. Let us now see what usage prescribes :

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part of his work is there any reference to the able discussions of Bynkershoek.

<sup>e</sup> Bynkershoek, *De Foro Legatorum*, cap. iii. §§ 11, 12.

for what is approved by usage, must necessarily prevail, since it is hence that the law of nations is derived.”<sup>r</sup>

In a subsequent passage of the same treatise, he examines the question whether any one nation can take away from a public minister the privileges to which he is entitled by the common law of nations? “*An qua gens privilegia legatorum, quibus utuntur ex jure communi gentium, possit tollere?*” According to my opinion, it may, provided it openly declares its intention so to act, because the enjoyment of all these privileges is founded upon tacit consent and presumption only. One nation has no power to impose an obligation upon another nation against its will; and the unanimous consent of all other nations cannot bind a free and independent nation if it think proper to establish different laws. Grotius, although a great partisan of the privileges of ambassadors, refers these privileges to the tacit convention of him who receives the ambassador. Now every tacit convention depends upon the will of the party who is supposed to consent. It will also be admitted that every nation is at liberty to receive, or not to receive, ambassadors, or to receive them upon certain conditions of which the determination depends upon the will of the party by whom they are received. If then a particular nation will only receive foreign ambassadors upon condition that they shall submit to the ordinary jurisdiction of the country, the rights of the ambassador are regulated on that footing: and in fact there is nothing to prevent the functions of embassy being exercised with this qualification. It is nevertheless very true, as laid down by the States General in a memorial published in the year 1651, that, according to the law of nations, an ambassador, of whatever crime he may be guilty, cannot be arrested: for equity demands that this rule should be observed, unless the contrary be declared when the ambassador is received.

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<sup>r</sup> Bynkershoek, *De Foro Legatorum*, cap. vii. § viii.



The law of nations is only a presumption founded upon usage; and every such presumption ceases the moment the will of the party is declared to the contrary. The late Mr. Huber says that ambassadors can only acquire and preserve their rights by prescription: but he restricts this principle to the pretended right of asylum in the house of the ambassador. For myself, I hold the rule to be general and to apply to all the privileges of ambassadors, and that there is no one which they can claim against the express declaration of the sovereign; because his will expressed excludes every presumption of tacit consent; and the law of nations, as I have already said, only binds between those who submit to its rules by tacit convention.<sup>s</sup>

In his treatise *De Rebus Bellicis*, Bynkershoek derives the law of nations from reason and usage (*ex ratione et usu*), and founds usage on the evidence of treaties and ordinances, (*pacta et edicta*), with the comparison of examples frequently recurring. Speaking of the law of contraband, he says: "The law of nations on this subject is to be drawn from no other source than reason and usage. Reason commands me to be equally friendly to two of my friends who are enemies to each other, and hence it follows that I am not to prefer either in war. Usage is shown by the constant, and as it were, perpetual custom, which sovereigns have observed of making treaties and ordinances upon this subject; for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the commencement of hostilities. I have said, *by, as it were, a perpetual custom*; because one, or perhaps two treaties which vary from the general usage do not alter the law of nations."<sup>h</sup>

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<sup>s</sup> Bynkershoek, *De Foro Legatorum*, cap. xix. § vii. See Barbeyrac's note on this passage as to the doctrine of Grotius.

<sup>h</sup> *Jus gentium in hanc rem non aliunde licet discere, quam ex ratione et usu. Ratio jubet, ut duobus, invicem hostibus, sed mihi amicis, æque amicis, sim, et inde efficitur, ne in causa belli alterum præferam. Usus*

The great work of Grotius on the laws of war still con- Rutherforth.  
 tinued to form the principal text book for instruction in most European universities in that part of the science of morals which relates to the rules of justice. One of the best commentaries of this sort is that published in 1754 by Rutherforth under the title of *Institutes of Natural Law*.<sup>i</sup> The greater part of this work is taken up with discussions relating to ethics and political law. But the ninth chapter of the second book is occupied with topics exclusively belonging to the law of nations properly so called.

In this division of his work the author examines the position of Grotius which considers the law of nations as a positive law deriving its authority from the consent of all or of most nations. His commentator concludes, as we have already seen, that the law of nations is only the law of nature applied, in consequence of a positive agreement amongst

intelligitur ex perpetua, quodam modo, paciscendi edicendique consuetudine: pactis enim Principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante bello. Dixi, *ex perpetua quodammodo consuetudine*, quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat. (Bynkershoek, Q. J. Pub. lib. i. cap. x.)

In the preface to this treatise, Bynkershoek asserts the supremacy of reason over authority in the science of international law. "Nulla ullorum hominum auctoritas ibi valet, si ratio repugnet. Non Grotius, non Puffendorfius, non Interpretes, qui in utrumque commentati sunt, me convincerint si non convincerit ratio, quæ in Jure Gentium definiendo fere utramque paginem facit. Inde est quod auctoritibus conservandis fere abstinnerim, non difficulter alioquin earum mole potuissem implere et onerare hos libros. Sæpe quidem Grotio et Puffendorffio testimonium denuntiavi, sed non alia ratione, quam quod illi in Jure publico principatum teneant, et aliorum omnium familiam ducant, silentio fere præteritis minorum Juris Gentium Interpretibus. Ab utriusque tamen sententia recessi, ubi ipsa ratio videbatur recedere. Hanc præcipue in consilium adhibui, et, nisi illa vincat, nihil vicerit in omni Quæstione Juris publici." (Q. J. Pub. lib. i. Ad Lectorem.)

<sup>i</sup> *Institutes of Natural Law*, being the substance of a course of lectures on Grotius *de Jure Belli et Pacis*, read in St. John's College, Cambridge, by T. Rutherforth, D. D., Archdeacon of Essex, etc 2 vols. 8vo. London, 1754.

mankind, to the collective bodies of civil societies as to moral agents, and to the several members of such societies as to parts of these bodies. It is the law of nature applied by positive consent to the artificial persons of civil societies : and consequently the dictates of it are only the dictates of right reason, and may be collected by arguing from the nature of things, and from the condition and circumstances of mankind when they are formed into such societies. The history of what has passed from time to time amongst the several nations of the world, may likewise be of some use in this inquiry : not because any constant and uninterrupted practice in matters which are indifferent by the law of nature, is to be collected from thence ; but because we shall then find what has been generally approved, and what has been generally condemned in the variable and contradictory practice of nations. So also the judgment and testimony of skillful persons will help to point out the law of nations ; because what is approved by men of prudence, and honesty, and experience, is more likely to be conformable to the dictates of right reason than what is approved of by the vulgar, and unthinking, and dissolute. And the testimony of the former will be of weight, as it will be an evidence, not only of their own sentiments, but likewise of what they have found upon diligent inquiry to be the general sentiment of the civilized part of mankind.

We shall here briefly notice several minor public jurists of this period.

§ 8. Minor  
public jurists.

Barbeyrac, by his accurate translations into the French language, of Grotius, Puffendorf, and Bynkershoek, contributed to popularize, and more widely to diffuse a knowledge of the science of international law, whilst he improved it by the valuable annotations with which he enriched these works.

Previous to the appearance of Vattel's work the Chevalier de Réal had published a book under the title of *Science du Gouvernement*, the fifth volume of which contains a summary of the positive law of nations of considerable

merit, compiled from the works of the classical jurists, and from modern examples of what had occurred in the intercourse of European states.<sup>\*</sup>

The Abbé Mably, who had been retained by Cardinal Tencin to draw up for the use of that minister memorials and reports, extracted from these papers a historical account of the treaties and negotiations which had taken place, from the treaty of Westphalia inclusive, which he published in 1748, under the title of *Droit public de l'Europe fondé sur les Traités*. He was at first refused permission to publish this work in France, and the official person to whom he applied asked him: *Qui êtes vous M. l'Abbé, pour écrire sur les intérêts des nations? Etes vous ministre ou ambassadeur?* He was reduced to the necessity of publishing in Holland, but other editions subsequently appeared at Paris. Réal criticises the title given by Mably to his work: "*Le titre de Droit public de l'Europe, que l'auteur a donné à son ouvrage, est vicieux. L'Europe n'a point de droit public; mais chaque nation de l'Europe en a un, et la matière que l'auteur a traitée se rapporte au droit des Gens.*" (*Science du Gouvernement*, tom. viii. p. 521.) He however praises the work as being distinguished from other collections of diplomatic acts by its analytical method enlivened by historical details relieving the usual dryness of such compilations.

Johann Gottlieb Heinecke, better known by the name of Heineccius, besides his well known elegant works upon the Roman law, published in 1738 at Halle his *Elementa Juris Naturæ et Gentium*, in which the subject of international law is incidentally touched as a branch of what he calls *jus sociale*. He also wrote prelections upon Grotius

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<sup>\*</sup> La Science du Gouvernement, tome cinquième contenant le Droit des Gens, qui traite des Ambassades, de la Guerre, des Traités, des Titres, des Prérogatives, des Prétentions, et des Droits respectifs des Souverains; par M. de Real, Grand Sénéchal de Forcalquier, Paris, 1754.

and Puffendorf, and a dissertation upon a very important portion of the maritime law of nations, under the title *De Navibus ob Vecturam Velitarum Mercium Commissis* which we shall have occasion hereafter to quote. Sir James Mackintosh calls Heineccius "the best writer of elementary books with which I am acquainted, on any subject."<sup>1</sup>

Valin's excellent *Commentaire sur l'Ordonnance de la Marine*, published in 1760, and his *Traité des Prises* which appeared in 1763, are too well known to render any particular account of these learned works necessary in this place. Of the same character is the *Tratado juridico-político sobre las Presas marítimas*, published at Cadiz in 1746, by D. Carlos Abreu, and of which a translation in French, with valuable notes by M. Bonnemant, appeared at Paris in 1802. Pothier also commented those parts of the *Ordonnance de la Marine* which relate to maritime captures in his *Traité de Propriété*.

§ 9. Maritime law of nations.

The two maritime wars terminated by the peace of Aix la Chapelle, 1748, and that of Paris, 1763, gave birth to multiplied questions respecting belligerent and neutral rights as to navigation and commerce. All the maritime powers, parties to the treaties of Utrecht, were also parties to the first mentioned war. The stipulations contained in those treaties derogating from the pre-existing law in favour of neutral commerce and navigation, consequently never became applicable as between the contracting parties; the *casus fœderis* that one or more of them should remain at peace, whilst the others were engaged in war, not having arisen. Nor was the benefit of these stipulations extended by them, to such nations as remained neutral. Each belligerent state adhered to its own exposition of the law of nations, as the rule by which it was guided in its conduct towards neutrals. Those maritime powers which had

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<sup>1</sup> Mackintosh, Discourse on the Study of the Law of Nature and Nations, p. 32, Lond. ed. 1800.

adopted the maxims of the *Consolato del Mare* relating to captures at sea, adhered to those maxims, except so far as they were modified by particular treaties with the Baltic powers, who remained neutral in the war between the southern and western states of Europe.

France made an essential change in her maritime legislation, approximating it more nearly to that of the *Consolato del Mare*. The ordinance of the 21st October, 1744, exempted from capture neutral vessels laden with enemy's goods; subjected the enemy goods only to confiscation; and restored the vessel with the residue of the cargo, except contraband articles. But the same ordinance revived two remarkable restraints upon the freedom of neutral commerce, which were contained in the preceding ordinance of the 23d July, 1704.

1. All goods, the growth, produce, or manufacture of the enemy's country were made liable to capture and confiscation, except in neutral vessels navigating directly from the enemy's port where the goods were laden to a port of their own country.

2. Neutral vessels were prohibited from carrying a cargo from one to another port of an enemy, whatever might be the origin of the goods, or to whomsoever they might belong.<sup>a</sup>

France had concluded in 1716, three years after the peace of Utrecht, a treaty of navigation and commerce with the Hanse towns, by which the concession made to these confederated republics by the treaty of 1655 was revoked, and neutral goods taken in the ships of an enemy were again rendered liable to confiscation, as well as enemy's goods in neutral vessels, the vessels only being exempt in the latter case.<sup>a</sup>

<sup>a</sup> Valin, *Traité des Prises*, ch. 5, sec. 6, No. 5, 10—17.

<sup>a</sup> By the 22d article of the treaty of 1716, it was stipulated: "Les vaisseaux des Villes anseatiques, sur les quels il se trouvera des marchandises appartenantes aux ennemis de sa Majesté, ne pourront être retenus, amenés,

In 1739, France concluded a treaty with Holland, by which the treaty of navigation and commerce between the two powers, concluded at Utrecht in 1713, which had expired by its own limitation, was revived, and the associated maxims of free ships free goods and enemy ships enemy goods were established as the conventional law between the contracting parties.<sup>o</sup>

In 1742, a treaty of commerce was concluded between France and Denmark by which the same rules were established.<sup>p</sup>

The vessels of Denmark and Holland were exempted, in consequence of the above treaty stipulations, from the operation of the French ordinance of 1744. They were at liberty to navigate freely from their own ports to another neutral port, or to an enemy's port, or from one enemy's port to another, except blockaded places, and whether the cargo was the property of enemies or neutrals, except contraband. The same exemption was extended to the navigation of Sweden and the Hanse towns, with this exception that enemy's property in the vessels of these two states continued liable to capture and confiscation, whilst the vessel with the residue of the cargo was restored. The complete exemption was however subsequently extended to Swedish vessels in consequence of special treaties between France and Sweden. Spain also enjoyed the same privilege under the still subsisting treaty of the Pyrénées, 1659.

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ni confisqués, non plus que le reste de leurs cargaisons ; mais seulement les dites marchandises appartenantes aux ennemis de sa Majesté, seront confisquées, de même que celles qui seront de contrebande ; sa Majesté dérogeant à cet égard à tous usages et ordonnances à ce contraires, et même à celles des années 1536, 1584, et 1681, qui portent que *la robe ennemi confisque la marchandise et le vaisseau ami.*" etc.

And by the 24th art. " toutes les marchandises et effets appartenans aux sujets des Villes anseatiques, trouvés dans un navire des ennemis de sa Majesté seront confisqués ; quand même ils ne seraient pas de contrebande etc," (Flassan, Histoire de la Diplomatie Française, tom. iv. p. 415.)

° Flassan, Histoire de la Diplomatie Française, tom. v. p. 107.

° Flassan, Histoire de la Diplomatie Française, tom. v. p. 166.

On the other hand, the privileges granted to Holland and the Hanse towns were revoked; so that the only states which enjoyed the complete benefit of the rule free ships free goods, at the time when Valin wrote, were Denmark, Sweden and Spain.

In other respects the Marine Ordinance of Louis XIV, 1681, remained in full force; and these two ordinances continued to form the prize code of France during the maritime war terminated by the peace of Aix la Chapelle, 1748, and that terminated by the peace of Paris, 1763.<sup>1</sup>

We have already seen under what circumstances the treaties between Great Britain and Holland were concluded conceding to the latter power the principle of free ships free goods, as the favorite object for which her statesmen contended with such zeal and perseverance in their negotiations with the great maritime powers. This concession on the part of the former was coupled with treaties of alliance and mutual guarantee between the two states which involved Holland in the war between France and Great Britain in 1747; whilst the treaty of 1739, by which the same concession had been made in favour of the Dutch navigation by France was suspended by the latter power. The republic thus lost, with her neutral character, the benefit of the concession with both belligerents during the latter part of the maritime war which was terminated by the peace of Aix la Chapelle. The alliance of 1756 between Austria and France delivered Holland from the danger of the barrier which had been secured to her in Belgium by the treaties of Utrecht, being invaded by the French; and though called upon by Great Britain, on the renewal of the war, to fulfill the guarantees contained in her treaties with that power, the republic refused on various grounds, to comply with this demand; and at the same time insisted on the benefit of the commercial treaties by which the rule

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<sup>1</sup> Valin, *Traité des Prises*, ch. 5. sec. 6. No's. 18, 19.



of free ships free goods had been mutually stipulated. This interpretation of the compact between the two countries was repudiated by the British government; which continued to treat the navigation of Holland, during the war of 1756, on the same footing with that of other neutral states, with whom it had no special treaty engagements in favour of the freedom of their flag. The commercial treaty of 1739 between France and Holland had been suspended since the year 1745; and the latter power, consequently, derived no benefit whatever as a neutral during the war terminated by the peace of Paris, 1763, from her antecedent treaties with France and Great Britain, by which the rule of free ships free goods had been stipulated between the contracting parties.

The treaty of Aix la Chapelle between France, Great Britain, and the United Provinces, (art. 3,) renews generally the *treaties of Utrecht*. As the treaty of commerce at Utrecht is not specially mentioned in that of Aix la Chapelle it might appear doubtful whether the stipulations of Utrecht in favour of neutral commerce were meant to be revived. This doubt is however entirely removed by the treaty of Paris, 1763, (art. 2,) between France, Great Britain, and Spain, to which Portugal acceded, which expressly renews and confirms (among other treaties) the treaties of peace and commerce at Utrecht.<sup>r</sup>

Such was the maritime law of nations, as evidenced in their practice and prize codes, and such was that law as recognised by treaties, during the period now in question. The two systems stood in direct opposition to each other.

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<sup>r</sup> Martens, Recueil des Traités, tom. i. p. 107. "Les traités de Westphalie, &c. ceux de paix et de commerce d'Utrecht," &c. "servent de base et de fondement à la paix, et au présent traité; et pour cet effet, ils sont tous renouvelés et confirmés dans la meilleure forme, ainsi que tous les traités en général qui subsistoient entre les Hautes Parties contractantes avant la guerre, et comme s'ils étaient insérés ici mot et mot, en sorte qu'ils devront être observés exactement à l'avenir dans toute leur teneur," &c. (art. 3.)

We have already seen that Bynkershoek, whose work on the Laws of War, was published after the peace of Utrecht, and before the war terminated by the peace of Aix la Chapelle, considered the rules of the *Consolato del Mare* as still constituting the law of nations on this subject, independent of special treaty stipulations at the time when he wrote.\*

Heineccius, who wrote about the same time, and whose dissertation on the confiscation of ships for carrying prohibited goods, had been seen by Bynkershoek before he put the finishing hand to his two chapters on this subject, is considered by the latter as confirming his own views.†

Heineccius,  
(b. 1681, d.  
1741,) on the  
question of  
neutral navi-  
gation.

In this dissertation, Heineccius considers the question of neutral navigation in the two different cases: "Quid si vel naves hostium merces amicorum, vel naves amicæ merces hostium contineant?" He states that the *Consolato del Mare* distinguished the cases:

1. Where the ship and cargo both belonged to the enemy, in which case they were both liable to confiscation.

2. Where the ship belonged to a friend, and the cargo to an enemy, the neutral master might be compelled to carry the cargo into a port of the captor's country, and be entitled there to receive his freight, the cargo alone being subject to confiscation.

3. Where the ship belonged to an enemy, and the cargo to a friend, the matter might be compromised; or if the freighters refused, the cargo might be carried into a port of the captor, who would then be entitled to receive the

\* Vide ante, First Period, § 14.

† Postquam hæc scripseram in manus meas pervenit clariss. Heineccii *Opusculorum Variorum Sylloge*, in qua etiam exstat ejus *Dissertatio de navibus ob vecturam vetitarum mercium commissis*, ubi c. ii. § 9, paucis exponit utramque speciem, de qua *hoc et præced. cap.* actum est. Sed tantum abest, ut, his lectis, mutem sententiam, ut eam potius confirmaverit viri magni auctoritas. Cur tamen nihil delendum censuerim, ipse videbis, si, quæ uterque nostrum dixit, conferre commodum sit. (Bynkershoek, Q. J. Pub. lib. i. cap. xiv. ad fin.)

freight on the cargo, as if it had been carried to its port of original destination, whilst the ship alone would be confiscated.

He then cites various ordinances and treaties of different maritime states modifying these rules, sometimes in favour, and sometimes against the interests of neutral navigation, and gives his reasons for approving of the rules as constituting the primitive law. He afterwards states the proofs and presumptions by which the right of property in the ship and cargo, are to be ascertained in the prize courts of the captor's country, whose final adjudication he considers as conclusive, according to the usage of nations as evidenced in their laws and treaties, upon the question of proprietary interest, and as transferring the property in the captured things to the purchaser under the sentence of condemnation. "But suppose" says he, "the sentence thus pronounced in the last resort, does not appear just to the neutral state, by whose subjects the property is claimed, what remedy remains?" And he answers, that prudence will dictate not rashly to resort to war. Redress is first to be sought for by friendly remonstrance, and if it is unreasonably refused, reprisals may be decreed by the supreme authority of the state, in which is vested the power of making war.<sup>u</sup>

During the maritime war between France and Spain, on one side, and Great Britain and Holland on the other, which was terminated by the peace of Aix la Chapelle, 1748, and in which Prussia remained neutral, a controversy arose between the British and Prussian governments respecting the rights of neutral navigation and commerce, in which these principles of the public jurists were brought to a practical test.

§ 10. Case of  
the Silesian  
loan.

Frederick II, by the treaties of Breslau and Berlin, 1742,

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<sup>u</sup> Heineccius, de Navib ob Vect. Merc. Vet. Comm. cap. ii. §§ 8—12, 16—22.

by which the province of Silesia was ceded by Austria to Prussia, had stipulated to assume the payment of the loan made by certain English merchants to Maria Theresa in 1735, and secured by a mortgage upon the revenues of that province. A number of vessels under the Prussian flag, and of cargoes claimed by Prussian subjects under other neutral flags, had been captured and condemned in the British prize courts, as contraband of war, or as enemy's property. The British Government having refused to listen to the demand of the Prussian cabinet for an indemnity to claimants, Frederick instituted, in 1751, a commission, consisting of four Prussian ministers of state, presided by his Chancellor Cocceji, to examine these claims, in order that they might be satisfied out of the Silesian loan, the payment of which he had withheld for that purpose. The commission, thus constituted, pronounced its sentence in the following year, 1752, assigning to the Prussian claimants, the British mortgage upon the revenues of Silesia as an indemnity for the losses the former had sustained from the seizure of their property. This sentence was grounded upon the following reasons :

1. That the British cruizers had no right to capture Prussian or other neutral vessels going to, or returning from an enemy's port, under the pretext that the cargo or any part thereof belonged to the enemies of Great Britain.

2. That the treaties between Great Britain and neutral powers, confirmed by the declaration of the British ministry to the Prussian diplomatic agents, had exempted enemy's property from capture, and had determined the list of contraband, from which ship timber, hemp, &c. were expressly excluded.

3. That therefore the British courts of admiralty had proceeded contrary to the law of nations, to treaties, and to this declaration, in condemning the property in question.

4. That consequently, the sentences of these courts could not have the effect of a *res adjudicata*.<sup>v</sup>

The king of Prussia declared to the British government his determination to retain, by way of reprisals for the acts of injustice thus done to his subjects, the debt secured by mortgage upon the revenues of Silesia, until the British government should have indemnified the Prussian claimants. This declaration was accompanied by an *Exposition des Motifs*, in which it was stated, that on the breaking out of war, the king having instructed his minister in London to demand from the British secretary of state, Lord Carteret, explanations respecting the intentions of his government as to the neutral commerce of Prussia, received a verbal answer that ship timber and naval stores were not to be considered as contraband, and that Prussian vessels should not be interrupted, provided they were not found carrying munitions of war to the enemy, or provisions to blockaded ports, and that in other respects commerce should remain on the same footing as in time of peace. The Prussian commerce, accordingly, remained uninterrupted until the year 1745, when their vessels carrying ship timber to France were detained, which was subsequently extended to the capture of other vessels laden with goods incontestably free. Remonstrances having been made to Lord Chesterfield, then secretary of state, by the Prussian resident at London, he received a written answer dated the 5th Jan. 1747, purporting that Prussia could not claim the benefit of the special treaties with other neutral powers; but that, in other respects, no interruption should be given to the Prussian navigators carrying on their trade in a lawful manner, and conformably to the ancient usage recognized by neutral powers.<sup>w</sup>

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<sup>v</sup> Martens, *Causes célèbres du Droit des Gens*, tom. ii. pp. 1—11.

<sup>w</sup> Martens, *Causes célèbres*, etc. tom. ii. p. 6.

The exposition then proceeded to lay down the following propositions of law arising from the above statement :

1. That the sea is free for the common use of all mankind ; that no one nation can appropriate it for its own exclusive benefit ; and consequently the right of navigating it cannot be lawfully interrupted by a state of war so far as neutrals are concerned. This position was supported by a reference to the texts of the Roman law, the writings of the public jurists, and the conduct of Great Britain herself, in contesting the claim of Spain to the exclusive navigation of the West India seas, and to the right of visiting and searching British vessels, which had given rise to the late war in 1739.

2. That even enemy's property cannot, by the law of nations, be taken in a neutral place, such as is a neutral vessel on the high seas ; and that this principle was confirmed by the treaties of Utrecht, 1713, between Great Britain and Holland and France, as well as that of 1674 between the two former powers, establishing the maxim of *free ships free goods*.

3. That the only exception to this general principle is that of contraband articles going to an enemy's use. These articles were distinguished by Grotius, (l. iii. cap. i. § v. No. 2.) into such as served exclusively for use in war, and such as might be used both in war and peace. The first, he considered as in all cases contraband when destined to the enemy's ports ; the second, only when destined to a port besieged or blockaded. That Great Britain herself had, by her treaties with Holland and other maritime powers, confined the list of contraband to munitions of war, expressly excluding provisions and naval stores, except in the single case of a blockaded port.

4. That the British courts of admiralty had no right to exercise jurisdiction over Prussian vessels, and their cargoes the property of Prussian subjects, taken in a place not within the British territory.

5. That the exercise of this pretended jurisdiction by the

unjust confiscation of Prussian property furnished a just ground for reprisals on the part of Prussia by the sequestration of the capital and interest of the Silesian loan due to British creditors.<sup>2</sup>

This report of the Prussian commissioners having been communicated to the British government, the whole matter was referred by it to two doctors of the civil law, and the king's attorney and solicitor general, the latter of whom was Mr. Murray, afterwards Lord Mansfield, celebrated for his subsequent fame as a judge in the English common law courts, and even then distinguished for his extensive knowledge of foreign and international jurisprudence.

The British commissioners made their report dated the 18th Jan. 1753, in which they state, as to the law of the case, that "when two powers are at war they have a right to make prizes of the ships and goods of each other on the high seas; whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he faithfully observes his neutrality.

"Hence the law of nations has established, that the goods of an enemy on board the ship of a friend may be taken.

"That the lawful goods of a friend on board the ship of an enemy ought to be restored.

"That contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality."

The report then proceeds to state that by the established law of nations, universally and immemorially received, the only method of determining whether a capture be, or be not, lawful prize, is by a regular judicial proceeding in the court of admiralty of that state to whom the captor belongs,

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<sup>2</sup> Martens, *Causes célèbres*, etc. tom. ii. pp. 12—41.

wherein both parties may be heard, and condemnation or restitution pronounced, according to the law of nations and treaties, from the presumptions and proofs recognized by them as rules of decision.

"If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal, and which judges by the same rule with the court of admiralty, viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"This manner of trial and adjudication is supported, al-  
luded to, and enforced by many treaties."

"In this manner all captures at sea were tried during the last war," (i. e. the war terminated by the treaty of Aix la Chapelle,) "by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, acting according to the law of nations, and particular treaties, all captures at sea have been immemorially judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

"Though the law of nations be the general rule, yet it may, by particular agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties that is the law between the parties to the treaty; and the law of na-

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7 A great number of maritime treaties are referred to in support of this position in the report, and it is added: "*Heineccius*, who was privy counsellor to the King of Prussia and held in the greatest esteem, speaks of this method of trial in his treatise "*De navibus ob Vecturam vetitarum Mercium commissis*." Cap. ii. §§ 17-18."



tions only governs so far as it is not derogated from by the treaty.

"Thus by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy ; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property duly attested.

"Particular treaties too have inverted the rule of the law of nations, and by agreement declared the goods of a friend on board the ship of an enemy to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned and many others.\*

"So likewise, by particular treaties, some goods reputed contraband by the law of nations are declared to be free.

"If a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to the courts of justice which are equally open and indifferent to foreigner or native ; so *vice versa*, if a person here is wronged by a person living in the dominions of his Prussian Majesty, he ought to apply for redress in the Prussian courts of justice.

"If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

"The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in cases of violent injuries directed or supported by the state, and justice absolutely denied *in re minime dubiâ* by all the tribunals, and afterwards by the prince."<sup>a</sup>

\* The treaties referred to are that between England and Holland, 1674, and the treaty of Utrecht, 1713, between Great Britain and France.

<sup>a</sup> Grotius, de J. B. ac P. lib. iii. cap. ii. §§ 4, 5. Vattel says, "La cour d'Angleterre a établi cette maxime avec beaucoup d'évidence à l'occasion des vaisseaux Prussiens saisis et déclarés de bonne prise pendant la der-

"As to the Prussian commission to examine these cases *ex parte*, upon new suggestions, it never was attempted in any country of the world before. Prize or not prize must be determined by courts of admiralty belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in these courts, according to the law of nations, or particular treaties where any are subsisting. If *in re minime dubiâ*, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determination. But there never was, nor never can be any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way."

After reasoning upon the facts of the Prussian claims, in order to show that no injustice had been done to the claimants in the British courts of admiralty, the report proceeds to answer the various propositions of law laid down by the Prussian commissioners.

1. Those who maintain the proposition that the sea is free, in its utmost extent, do not dispute that when two powers are at war they may seize the effects of each other upon the high seas, and on board the ships of friends. Therefore the controversy respecting the dominion of the seas was not in the least applicable on the present occasion.<sup>b</sup> The captures made by Spain of British vessels, on account of which reprisals were issued in 1739, were not made in time of war, nor in the exercise of the rights

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nière guerre. Ce qui soit dit sans toucher au mérite de la cause particulière, en tant qu'il dépend des faits. Voyez le rapport fait au roi de la Grande Bretagne par le chev. Lee, etc. C'est un excellent morceau du droit des gens." (Vattel, Droit des Gens, liv. 2, ch. 7, § 84.) Montesquieu also calls the report "une réponse sans réplique." (Œuvres, tom. vi. p. 445.)

<sup>b</sup> Grotius, de J. B. ac. P. lib. iii. cap. i. § 5, no. 4, in Not. lib. iii. cap. vi. § 6.

of war. They were made for alleged breaches of the municipal laws of Spain. They were not adjudicated in courts proceeding according to the law of nations, but in revenue courts, by rules of decision which were complained of, and an indemnity was agreed to be paid to the British claimants by a convention which was not performed by Spain.

2. The contrary of the Prussian proposition that *free ships make free goods* was alleged to be proved by the writings of the public jurists, and by the constant practice of all nations ancient and modern.<sup>c</sup> "But" it was added—"the general rule cannot be more strongly proved than by the exception which particular treaties have made to it."

3. The report makes no other answer to the Prussian argument, limiting the list of contraband to articles directly useful for war, than by denying that Prussia was entitled to the benefit of the relaxations of the law of contraband, which had been extended by treaty, the result of mutual concessions, to other neutral states. The British commissioners probably felt themselves more hardly pressed in this part of their case, than in respect to the other questions involved in its discussion, by the uncertain state in which the law of contraband then was; it being, as we have before shown, quite undecided between Great Britain and other states, who had an interest in the free exportation of their native produce, whether naval stores and provisions could, under any circumstances, be considered as contraband; and whether, when they became so as destined to a port of naval equipment, or to relieve the enemy from the perils of general famine, the neutral goods were liable to confiscation, or subject only to the milder right of pre-emption.<sup>d</sup>

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<sup>c</sup> Consolato del mare, cap. 273. Grotius, lib. iii. cap. i. § 5, no. 4, in Not. lib. iii. cap. vi. § 6, in Not. Loccenius, de Jure Maritimo, lib. ii. cap. iv. § 12. Voet, de Jure Militari, cap. v. no. 21.<sup>e</sup> (Heineccius, "the learned Prussian before quoted," de Nav. ob Vect. vet. Merc. Comm. cap. ii. § 9. Bynkershoek Q. J. Pub. lib. i. cap. xiv. Zouch, de Judicio inter Gentes, Pars ii. § viii. no. 6.)

<sup>d</sup> Vide ante, Part First, § 15.

The Prussian commissioners drew up a reply to this report of the British civilians, in which they admit that the practice of nations affords but too many examples of the exercise of the pretended belligerent right of visitation and search to the great injury of neutral commerce ; but that this practice being contrary to the law of nature, and incompatible with the general utility and convenience of mankind cannot be considered as sufficient to establish a principle of the law of nations. By the law of nature the ship of a friend is his exclusive property, wherever it may be found, and the belligerent has no more right to enter it for the purpose of capturing the goods of his enemy than he has to enter a neutral port for the purpose of there seizing the ships and goods of the same enemy. This law of nature has been confirmed by the laws and customs of all nations, forbidding, in the case of fresh pursuit of an enemy's vessel, the belligerent cruizer from capturing it within a neutral territory. Grotius states expressly that the neutral sovereign has a right to prevent it.\*

If the utility and general convenience of mankind were considered, it would be evident that the freedom of commerce and navigation is of general utility, whilst the maxim which allows the goods of an enemy to be seized on board the ships of a friend, must occasion infinite vexation and injury to those nations not engaged in the war. The commercial nations of Europe had so sensibly experienced the inconveniences which resulted from the application of this maxim, that the greater part of them had adopted the contrary rule of free ships, free goods, (*que bord libre rend la marchandise libre*,) and had established it by express treaties. And as the utility and general convenience of mankind form the only solid foundation of the law of nations, these treaties, far from constituting an exception,

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\* De J. B. ac P. lib. iii. cap. vi. sec. 26, No. 2.

evidently prove that the rule established by them belongs to that law, and ought to be followed in the practice of every state.

Thus the maxim of *free ships, free goods*, is not only conformable to the law of nations, but it would even be for the interest of Great Britain herself that it should be universally adopted, with the single exception of articles contraband of war and those which are being carried to blockaded ports. And as she had established this rule by formal treaties with some nations, she could not justly refuse it to all those powers who were willing to enter into an equivalent reciprocal engagement, every neutral state having a right to insist on being treated on a footing of equality in respect to the freedom of commerce. By associating the maxim of *free ships, free goods*, with the converse maxim of *enemy ships, enemy goods*, all controversy respecting the proprietary interest in the cargo is prevented; and every neutral nation is left free to trade in all articles not contraband, and to all ports not blockaded; so long as it confines itself to its own proper commerce without engaging in the enemy's trade on his account. In this last case it would no longer act as a neutral, but as an ally of the enemy, and would justly deserve to be treated as an enemy, if it did not abstain, on due notification, from such unlawful traffic. According to Grotius, it is the duty of every belligerent nation on the breaking out of war, to send such a notification to the states which remain neutral, and especially to those with whom the belligerent has no special treaty engagements, admonishing them of the rules to be observed in respect to their navigation, and especially in respect to the contested subject of contraband. This duty the British government had neglected during the late war; but his Prussian Majesty had received assurances, both verbal and written, from that government, from which he had a just right to infer that the same immunities which had been secured to other neutral states would be extended to the commerce of his subjects, and consequently that

they would enjoy the benefit of the maxim of *free ships, free goods*, with the usual exception of contraband.

This controversy was finally adjusted by a declaration, annexed to the treaty of defensive alliance between Great Britain and Prussia, signed at Westminster January 16th, 1756, by which his Prussian Majesty was to take off the sequestration laid on the Silesian debt, and pay the amount of capital and interest due to the British creditors, and the British government were to pay the sum of twenty thousand pounds for the extinction of all claims of the Prussian government and subjects on Great Britain. This sum was paid and distributed among the Prussian subjects who had proved their losses under the commission.<sup>f</sup>

The maritime war terminated by the peace of Paris, 1763, was also signalized by the first attempt on the part of Great Britain to establish the doctrine which subjects to capture in time of war any neutral commerce which is not open in time of peace. This principle, which has since received the name of the rule of war of 1756, was applied to confine neutrals to their accustomed trade previous to the war, and to exclude them from the colonial and coasting trade of the enemy as not being usually open to foreigners in time of peace. This rule, which might seem to receive some countenance from the example of France in her ordinances of 1704 and 1744, appears to have been originally founded upon the fact that the French, finding the trade with their colonies under their own flag almost entirely cut off by the naval superiority of Great Britain, relaxed the

§ 11. Rule of the war of 1756.

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<sup>f</sup> Martens, *Causes célèbres du Droit des Gens*, tom. ii. pp. 73—88.

M. de Martens adds in a note : " M. de Hertzberg fit en 1747 un mémoire sur cette dispute, qui n'a pas été imprimé mais qui fut envoyé au ministère Britannique. On peut dire que c'est Frédéric II qui a le premier soutenu les principes de la neutralité maritime, et que M. de Hertzberg en a été le premier défenseur." I have in vain caused inquiries to be made in the Prussian archives of state, for this memoir. After a diligent search, it could not be found.

monopoly of that trade, and allowed the Dutch to carry it on under special licenses or passes, excluding at the same time all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers and condemned in their prize courts, upon the principle that by such employment they were in effect incorporated into the French navigation, having forfeited their neutral character and adopted that of the enemy. As soon as it was known that this effect was imputed to these licenses, they were discontinued, or pretended to be so ; but the discontinuance, whether real or supposed, produced no change in the conduct of Great Britain ; for neutral vessels employed in this trade were captured and condemned as before. There is some obscurity as to the principle on which the condemnations were founded after the discontinuance of the licenses ; it being sometimes stated in the arguments referring to that period that they were founded on the principle that the trade was virtually or adoptively a French trade ; and sometimes that it was founded on the general principle that it was a trade not open in time of peace. Be this as it may, the Dutch remonstrated against the application of the rule to their commerce, and appealed to the treaty of 1674 between the two countries, by which the maxim of *free ships, free goods*, was reciprocally adopted, as well as the explanatory declaration of 1675, by which the freedom of neutral navigation was expressly declared to extend to the trade from one enemy's port to another, whether these places belonged to one or several states with whom the other party should be at war. The British government, at first, contended that this liberty was confined by the terms of the treaty to the accustomed trade of neutrals in time of peace ; but being at last driven from this ground they rested the justification of their measure upon the above mentioned principle of adoption or naturalization. But whatever might be the character of the rule it does not appear to have been adopted by Great Britain previous to the war of 1756 ;—it was suffered to slumber during the

American war ; and, as we shall hereafter see, was again awakened during the war of the French revolution and applied to the total prohibition of all neutral commerce with the enemy's colonies.<sup>a</sup>

Holland was not the only neutral state which felt itself aggrieved by the measures adopted by the belligerent powers, and especially by Great Britain, during the war of 1756. Denmark, under the wise and liberal administration of Count Bernstorff, the first great statesman of that name, sought to avail herself of the advantages of neutrality to extend her commerce and navigation. These interests could not wholly escape the ravages of a war which was principally directed by the British government against the colonies and commerce of its enemies. The Danish government sent a special mission to remonstrate with the British and French courts against the depredations committed by the belligerent cruizers on the trade and navigation of its subjects. The minister employed on this mission was Hübner, and this circumstance gave occasion to the publication of his treatise on the Seizure of Neutral Vessels, so often referred to in the more recent controversies respecting belligerent and neutral rights.<sup>b</sup>

In this work, the author lays at the foundation of his reasoning the principle of the freedom of the high seas, as the common property of mankind, incapable of being exclusively appropriated by any one nation, and in the free use of which all have an equal right to participate for the purposes of commerce and navigation. Every nation has consequently a right to navigate the ocean, and to traffic with every other in such articles, and on such conditions, as

§ 12. Hübner,  
de la Saisie  
des Bâtimens  
Neutres.

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<sup>a</sup> Madison, Examination of the British Doctrine which subjects to capture a Neutral Trade not open in Time of Peace, pp. 51—55, 81—99, Lond. ed. 1806.

<sup>b</sup> De la Saisie des Bâtimens Neutres, ou du Droit qu'ont les nations belligérantes d'arrêter les Navires des Peuples Amis. Par M. Hübner, etc. à la Haye, 1759.



the other state thinks fit to allow, in time of peace. The question to be examined is, whether, and to what extent, the belligerent nations can lawfully intercept this traffic of neutrals with their enemies in time of war ?

He concludes that the neutral has a right to continue his trade with those nations who happen to become enemies of each other exactly as if they remained at peace, provided he abstains from all direct interference in the war, that is to say, provided he remains perfectly neutral. Nor is it sufficient, in order to justify an interruption of this commerce, that it is found to contribute to strengthen the enemy, and thus enable him the longer to resist his adversary ; or that it contributes to strengthen one of the belligerents more than another on account of the disparity of their naval forces. These are but incidental circumstances, for the consequences of which the neutral is no way responsible, since he does but use an incontestable right, which cannot furnish a just ground of complaint on the part of those who may be incidentally injured by its exercise.

The only portion of neutral commerce which Hübner hesitates to include in this general immunity is the trade with the enemy's colonies. "This trade," says he, "may perhaps be considered unlawful, contrary to neutrality, and constituting a direct interference in the war, since neutral nations are not permitted to carry it on in time of peace ; it is only opened to them in time of war, and *on account of the war* ; and lastly, that on the re-establishment of peace, they are again excluded from it, so that the commerce of neutrals with the colonies of a state at war appears to be subject to the rigorous laws of war. Still I do not perceive why neutral states ought to refuse themselves so considerable an advantage provided they abstain from furnishing the enemy's colonies with articles prohibited in time of war. If besides that, they also abstain from carrying thither provisions, by which I understand articles of the first and second necessity, which in time of war are equivalent to contraband of war properly so called, it is then

evident that neutrals may lawfully carry on this commerce, because the principal cause of its being opened to them during the war will not produce the intended effect; this commerce will not directly influence the fortunes of the war, and consequently will not become liable to interdiction by the other belligerent as being a direct succour afforded to his enemy.<sup>1</sup>

After attempting to illustrate his reasoning respecting this general freedom of neutral navigation and commerce in time of war by several historical examples, Hübner proceeds to consider the duty of neutrals to abstain from all direct interference in the war, such as attempting to trade with besieged or blockaded places, which the belligerent has a right to punish by the seizure and confiscation of the vessel and cargo making this attempt. (Ch. 5, § 2, 3.) He admits that there are some cases in which the belligerent nations may have a right to capture neutral vessels. He then states that this right is founded neither upon the sovereignty of the seas, which cannot be appropriated by any particular nation; nor upon the jurisdiction of one nation over another, which would be incompatible with the equal sovereignty of both; nor upon the rights of war itself, which can only be exercised against enemies; nor upon the right to interrupt, in time of war, the lawful, accustomed trade carried on by neutrals in time of peace; nor upon the right to intercept the articles called contraband, as being *per se* unlawful objects of commerce. After stating upon what this belligerent right is *not* founded, he proceeds to inform us that it is actually founded upon the nature of neutrality itself as he had before defined it. The belligerent nations have the right of seizing the vessels belonging to neutral states, or to their subjects, whenever these vessels shall have committed any act contravening

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<sup>1</sup> Hübner, de la Saisie des Bâtimens Neutres, tom. i. Prem<sup>re</sup> Partie, ch. iv. § 6.

the duties of neutrality. He infers as a corollary from this principle that neutral vessels are liable to capture in the following cases :

1. When they voluntarily aid the belligerent parties in their warlike enterprises.
2. When they are vessels of war built in a neutral port, and going to be employed in the enemy's service.
3. When they serve as spies for the enemy.
4. When they are carrying to a blockaded port munitions of war or provisions.
5. When they hold communication with such a place without the consent of the blockading power.
6. When they are carrying to the enemy articles of direct and immediate use in war, such as troops and military stores.
7. When they are found without sufficient documentary evidence on board to establish their neutral character.

After enumerating all these cases in which neutral vessels are liable to capture, our author limits this liability by a proposition, which he admits seems at first sight paradoxical. "Neutral vessels," says he, "*admitted to be such, (reconnus pour tels,)* are not liable to capture on the high seas, even when laden with contraband of war or enemy's property." (Ch. 8, § 7.) At the same time he admits the belligerent right of visitation and search for the purpose of ascertaining the national character of the vessel. The right of visitation and search he considers as necessarily incident to that of capturing enemy's property, which may lawfully be taken in a place belonging to either of the belligerents, or in a place belonging to no one. The ocean constitutes such a place, and consequently the belligerent has a right there to capture the property of his enemy, provided he does no injury to his friend—the neutral. For this purpose, it is necessary that the belligerent should be able to distinguish friend from foe, and to ascertain, by actual examination, whether the vessel is really neutral. But what if the result of the search should prove to be unsatisfactory ?

What if it should fail to convince the belligerent cruizer that the vessel is really what she pretends to be? Hübner answers these questions by stating, that when he denies that the belligerent has any right to capture neutral vessels on the high seas, he means to confine this proposition to such vessels *as are admitted to be neutral*. If the vessel in question is not furnished with sufficient documentary evidence to establish her neutral character, he admits that she may justly be seized, and detained until her neutrality is fully proved. Nor does he apply his general rule to such vessels as forfeit their national character by unneutral conduct, such as interfering directly in the war, taking an active part in favor of either belligerent, going to succour a besieged place, etc. No documentary evidence can be sufficient to establish a pretended neutrality thus falsified by facts which are stronger than any other evidence. (Tom. i. Pte i. ch. 8. § 8.)

In the second part of the first volume of his work, Hübner considers the nature of contraband of war according to the universal law of nations. He adopts Grotius' classification of the goods which may constitute the cargo of a neutral vessel, dividing them into such articles as serve only for warlike uses, such as are of indiscriminate use in war, and in peace, and such as are used only in peace. In the first class, he includes only munitions of war, ships of war, and such naval stores as ship timber, sails, and cordage of a certain size. In the second class, he includes coined money, provisions of all kinds, iron in bars, copper, pitch, tar, hemp, and clothing of all kinds. In the third class, he comprises all the remaining objects of commerce.

All the articles included in the first class he considers as always liable to capture and confiscation when going to the enemy's use. Those of the second class are thus liable under certain circumstances. And those of all three

classes are thus liable when going to a port besieged or blockaded.<sup>k</sup>

The prohibition of certain articles being carried by neutrals to the enemy, arises, not from the rights of war, which can only effect the belligerents, but from the duties of neutrality. It is the duty of the neutral, first, to abstain from all direct interference in the operations of the war; and secondly, it is his duty, in other respects, to observe an exact impartiality in his conduct towards the belligerent powers. From the first of these duties arises, according to Hübner, the liability to capture and confiscation of all articles of the *first* class, when going to the enemy's use, and of all other articles when destined to a besieged or blockaded port. The transportation of these articles by the neutral constitutes a direct interference in the operations of the war, and is consequently inconsistent with the duties of neutrality. As to the articles of the *second* class, they can only become liable to capture and confiscation by a breach of the second duty of neutrality, which consists in observing an exact impartiality towards the belligerents. Thus naval stores and provisions become contraband, when they are being carried to the fleets, armies, camps, or ports of naval equipment of the enemy, if the neutral at the same time refuses to supply the other belligerent party with the same articles.<sup>l</sup>

In his second chapter, our author considers the question, whether by the universal law of nations the neutral flag covers the cargo? in other words, whether it be sufficient to prove by the documentary evidence found on board a vessel, that she is really neutral, to secure the cargo, not consisting of contraband articles, from capture, although it may be enemy's property?

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<sup>k</sup> Tom. i Pte. ii. ch. i. § 6.

<sup>l</sup> Ch. i. § 10. But what if the other belligerent does not stand in need of similar supplies, whilst to his enemy they are indispensably necessary? On this point Hübner is silent.

In this part of the discussion he again reverts to his fundamental principle as to the duties of neutrality, consisting in non-interference in the war, and perfect impartiality towards the belligerent parties. So long as these are fulfilled, the latter have no right to interrupt the commerce and navigation which the neutral was accustomed to carry on in time of peace. It is universally admitted that enemy's property cannot be captured *in a neutral place*. Neutral vessels are, without question, neutral places. Consequently, a cargo consisting of enemy's property is not liable to capture from on board a neutral vessel any more than in a neutral territory.<sup>m</sup>

Hübner seems here to have forgotten that in the former part of his work, he had admitted the right of the belligerent to capture the property of his enemy in a place belonging to no one, such as the ocean, provided he does no injury to his friend the neutral. He now lays down the broad proposition that a neutral vessel on the ocean consti-

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\* "Les ennemis mêmes et tous leurs effets, non exceptés ceux qui sont visiblement de contrebande en temps de guerre se trouvent en sûreté et à l'abri de toute insulte à l'égard de leurs adversaires, quand ils se rencontrent ou restent dans un lieu neutre. De sorte que, de l'aveu de tout le monde, un ennemi ne doit ni attaquer son adversaire dans un lieu semblable, ni s'y saisir de quoi que se soit qui lui appartienne. Or les vaisseaux neutres sont sans contredit des lieux neutres. D'où il s'ensuit que, quand ils seroient incontestablement chargés pour le compte des ennemis, les belligérans n'ont aucun droit de les inquiéter au sujet de leurs cargaisons; puisqu'il revient au même d'enlever des effets d'un navire neutre, ou de les enlever sur un territoire neutre: Bien entendu qu'un tel navire ne se trouve pas lui même sur la juridiction reconnue, quoique passagère, de la puissance belligérante qui juge à propos de faire faire des recherches là dessus; auquel cas le capitaine doit constater par ses papiers les droits que lui ou d'autres neutres ont sur la cargaison de son bâtiment, pour pouvoir réclamer efficacement, en faveur de cette cargaison, les immunités pacifiques de sa patrie; car il n'est pas douteux qu'une puissance ennemie ne puisse se saisir légitimement chez elle, c'est à dire dans les endroits qui sont reconnus pour être de sa juridiction, des biens appartenant manifestement à sa partie adverse" (Hübner de la saisie des bâtimens neutres, tom. i. pt. i. ch. 2, § 3.)

tutes a part of the neutral territory ; although he takes no pains to prove this proposition, on which the whole superstructure of his argument is built ; and although it seems hardly consistent with what he had before admitted as to the exercise of the belligerent right of visitation and search in a place belonging to no one such as the ocean. Bynkershoek, as we have already seen, infers the right of capturing the cargo consisting of enemy's property, from the right of visitation and search, in order to ascertain the neutral character of the vessel. It seems difficult to resist the force of his argument, if it be once admitted, as it is by Hübner, that the belligerent may exercise the right of visitation and search for this purpose in a neutral vessel on the high seas. According to him, the only reason, why the belligerent cannot exercise the right of capturing his enemy's property on board a neutral vessel on the ocean, is that the vessel constitutes a part of the neutral territory. But the same reason must equally apply to prevent his exercising the right of visitation and search, or any other belligerent right, on board of a neutral vessel thus situated.

Having disposed of this part of this subject, Hübner proceeds (tom. 2, pt. 1. ch. 1.) to consider the question of the competent jurisdiction to try and determine the validity of captures of neutral vessels. He holds that the courts of admiralty of the capturing state, which, by the usage of nations, actually exercise this jurisdiction, are incompetent, according to the primitive law of nations, since neither the persons nor the property of the neutral carried by force into the belligerent ports, can thereby become subject to the jurisdiction of the local tribunals. The place where the controversy originated is not within that jurisdiction ; and one of the parties, together with the subject matter of the controversy, has been brought locally within it only by the exercise of force, which is insufficient to sustain the authority of the local tribunals. The law to be applied to the determination of the case is not the civil law of the

belligerent state, but the universal law of nations, which cannot be fairly administered by an *ex parte* tribunal, in which one of the parties to the controversy is judge in his own cause. He admits that the usage of nations in this respect, founded on the consent of nations, becomes in a certain sense the law of those nations who have acquiesced in its establishment. But this consent is merely a tacit consent, and can be binding, even upon those nations, only until they expressly declare their dissent. All the precepts of the customary law of nations are of this nature, and they cease to be binding upon any particular state the instant it thinks fit to declare itself absolved from the obligation. Hübner refers to the then recent example of Prussia, which having refused to acknowledge the conclusiveness of the sentences of the British courts of admiralty in cases where the interests of Prussian subjects were concerned had established a judicial commission within its own territory to re-examine these sentences; and had actually received from the British government a pecuniary indemnity to be distributed among the claimants according to the award of that commission, as a proof of the express dissent of, at least, one neutral nation, from the usage in question. He proposes to remedy the defects of the ordinary prize jurisdiction recognized in this usage by the establishment of a mixed commission consisting of judges jointly appointed by the capturing state and by the neutral power whose subjects are parties to the controversy.

In the second part of this volume our author examines the effect of treaties, as constituting the conventional law of nations, and especially the treaties existing, at the time he wrote, between his own country (Denmark) and other maritime states. He draws from this source additional arguments favourable to the conclusions he had already endeavored to establish from the reasoning we have briefly analyzed. The radical infirmity of this whole argument seems to consist in admitting the legality of the exercise of the belligerent right of visitation and search on board of



neutral vessels on the high seas for the purpose of ascertaining the national character of the vessel. It is plain that the exercise of this right would be perfectly nugatory,—unless it drew after it the corresponding right of seizing and carrying into a port of the captor's country for further examination in case the preliminary enquiry proves unsatisfactory. When the vessel and cargo are thus brought within the territory of the belligerent there seems to be no difficulty in subjecting them to the jurisdiction of the local tribunals appointed to judge in matters of prize. It is true that they are thus brought in by force; but it is a lawful force, the exercise of which follows as a necessary consequence, from the right of visitation and search. The jurisdiction exerted by the prize tribunals of the belligerent state is not ordinary civil jurisdiction. It is subject to the responsibility of the state towards neutral powers whose subjects may be aggrieved by their proceedings. The sentences of these tribunals, whether of restitution or condemnation, are conclusive of all controversy between the captors and captured. In the case of condemnation, the sentence is also conclusive as to the title to the property, which is irrevocably transferred to the purchasers under its sanction so as to preclude all further claim of the original owners. But it does not preclude their right to apply, through their own government, to the government of the belligerent state, in case the sentence be unjust and inconsistent with the law of nations. If justice be finally denied by the tribunal of the last resort, and afterwards by the sovereign himself, this denial forms the ground of lawful reprisals on the part of the neutral state whose subjects have been thus injured by the commissioned cruisers and tribunals of the belligerent state.<sup>a</sup>

The doctrines of Hübner respecting the rights of neutrality found but little favour with the public jurists his

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<sup>a</sup> Rutherford's *Institutes of Natural Law*, vol. ii. b. ii. ch. 9, § 19.

cotemporaries. Valin, in commenting upon article 7, liv. 3, tit. 9, of the Marine Ordinance of Louis XIV, 1681, which subjects neutral vessels laden with enemy's goods, and neutral goods laden on board of enemy's vessels, to capture and confiscation, and which still continued to be the law of France at the time he wrote, with the exception of the modification introduced by the Règlement of 1744 in consequence of special treaty stipulations, says: "M. Hübner, in his treatise upon the seizure of neutral vessels," (tom. 1, part. 2, ch. 2, § 5, et suiv.) "goes still further; for he attempts very seriously to prove that the neutral flag covers the entire cargo, even though it belong to the enemy, or is laden on his account, so that he only excepts contraband goods. But this author is decidedly in favour of neutrals, and his sole object in writing appears to have been to plead their cause. He, in the first place, lays down these principles as indubitable, and then draws from them such inductions as suit him. This is a very convenient method of reasoning. But in order to refute him we might begin by asking upon what he establishes his pretended principle which exempts from confiscation enemy's goods found in a neutral vessel? Besides, by our laws, this confiscation is expressly authorized, and to this rule we are bound to adhere."<sup>o</sup>

We have already seen that the opinion of Heineccius concurred with that of Bynkershoek as to the primitive rule of the law of nations on this subject previous to its being modified by treaties. Vattel also explicitly recognizes it as a necessary consequence of the belligerent right of visitation and search.<sup>p</sup>

The diplomatic relations between the different states of

§ 13. Questions of Precedency.

<sup>o</sup> Valin, *Traité des Prises*, ch. 5, § 5.

<sup>p</sup> Si on trouve sur un vaisseau neutre des effets appartenant aux ennemis, on s'en saisit par le droit de la guerre; mais naturellement on doit payer le fret au maître du vaisseau, qui ne peut souffrir de cette saisie. (Vattel, *Droit des Gens*, liv. 3, ch. 6, § 115.)

Europe during this period were marked by discussions of etiquette and precedence which to us appear vain and frivolous, but were then considered as essential proofs of the equality and independence of nations. Among the questions of this nature was that of the precedence claimed by crowned heads over states under republican forms of government. This claim is evidently unfounded in the eye of reason. Since it is the independence and sovereign dignity of a nation which is to be represented in the intercourse between states, it is plain that the nature of its internal constitution cannot affect the pretensions of others in this respect. The sovereignty of every state must be lodged somewhere ; and it is immaterial, with respect to foreign nations, whether it is possessed by a single individual, or by many, by hereditary descent, or by election. The governments of nations, whether monarchical or republican, are their only representatives towards foreign states ; and the nations themselves being equal, the governments are also equal in respect to one another. There can, therefore, be no rational difference in point of rank between states drawn from the nature of their various municipal constitutions. But the usage of nations, which constitutes the law of nations, had unquestionably at a certain period made such a difference, and this usage probably arose from two circumstances.

1. In all cases where precedence might come in question, the contest could only be conducted by the executive governments of the respective nations, or the representatives of those governments. According to the opinions of the sixteenth century, and the times preceding, there could be no *personal* equality between a monarch professing, perhaps, absolute authority over the internal and external affairs of his nation, and the chief of a state, or a council of men, who derived a temporary and limited authority from the choice of others. This would apply with peculiar force to the case of ambassadors, who were supposed to represent in a peculiar manner the person of their sovereigns.

2. The pre-eminency of monarchies in former times was also probably inferred from the doctrine, not then exploded, of the divine right of kings, which would of course elevate them above those who derived their authority merely from the choice of the people or from privileged bodies acting in the name of the nation.<sup>4</sup>

The earliest exception to the acknowledged pre-eminence of nations represented by crowned heads was in favour of the republic of Venice. This was subsequently extended to the United Provinces of the Netherlands, whose ambassadors insisted at the negotiations for the peace of Westphalia that their republic should be treated on a footing of equality with that of Venice.

Still these *great* republics, as they were called, yielded the precedence to the representatives of crowned heads on all occasions when order or procession was concerned. The ephemeral commonwealth established in England after the dethroning and death of Charles I, was the first which obtained the concession of an unqualified equality in the congress of European states. We have already seen that Cardinal Mazarin admitted the principle that this change of government made no change in those relations between France and England, which were founded upon permanent commercial and political interests; and the Protector Cromwell exacted from all nations in ceremonial intercourse the same honours which the English kings had previously enjoyed.<sup>5</sup>

As between crowned heads themselves, the precedence among temporal sovereigns was generally conceded to the emperors of Germany as the supposed successors of Charlemagne in the restored empire of the west. On the abdication of the emperor Charles V, a fierce contest for precedence almost immediately ensued between France and

<sup>4</sup> Ward's History of the Law of Nations, vol. ii. pp. 444—450.

<sup>5</sup> Thurloe's State Papers, vol. iii. p. 315, iv. 740.

Spain, which was not finally decided in favour of the former until the middle of the seventeenth century. The peace of the council of Trent was disturbed by this contest; and it was again renewed at the conferences of Munster, where the ambassadors of the two powers would never see each other, and where the congress, which was to put an end to the wide spread devastations of the thirty years war, had nearly been broken up because it could not be settled which of the two crowns should be named first in the protocols. The contest was at last brought to a termination by the bloody collision which took place at London in 1661 between the French and Spanish embassies, in which several persons of their respective suites were killed and wounded. On this occasion Louis XIV, exacted a solemn reparation in the form of a special embassy from Philip IV, by whom the precedence of France was expressly acknowledged.<sup>a</sup> It continued even after the equality of crowned heads seemed to be generally acknowledged in Europe; for when the English mediators at the congress of Nimiguen in 1676 proposed some rules for the observation of the several ministers indicative of equality, the French ambassadors expressed their acquiescence towards all except the Spaniards, in respect to whom they insisted on the precedence established by the above arrangement.<sup>†</sup>

Privileges of  
Ambassadors.

These disputes respecting precedence in the ceremonial intercourse of nations were closely connected with the rights and privileges of ambassadors, which came at last to be defined with tolerable accuracy during this period. We have already seen that the earliest institutional writer of merit upon this important subject was Alberico Gentili,<sup>u</sup> who, in 1584, the year following the publication of his treatise

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<sup>a</sup> This event was commemorated by a medal struck on the occasion with the legend: "*Jus præcedendi assertum*," and below: "*Hispanorum excusatio coram xxx Legatis principum*."

<sup>†</sup> Life and Letters of Sir L. Jenkins, tom. i. p. 440.

<sup>u</sup> Vide ante, Introduction, p. 50.

tise *De Legationibus*, was consulted together with Hototman, by the English court, upon the case of Mendoza, the Spanish ambassador, accused of conspiring to introduce foreign troops into England, and dethrone Queen Elizabeth. They both concurred in opinion that an ambassador, though a conspirator against the government of the country where he resided, could not be put to death, but should be referred to his master for punishment. In consequence of this opinion Mendoza was merely ordered to depart the realm, and a commissioner sent by the English government to Spain to prefer a complaint against him.<sup>v</sup>

Such also was the opinion of Grotius, who, writing in the beginning of the following century, held that the tacit consent of nations had exempted the persons of an ambassador and his suite from the criminal and civil jurisdiction of the state, by whom he had been received upon this implied condition, in all cases, except those where the just necessity of self defence creates an exception to all human laws.<sup>w</sup> There is however a remarkable case, which occurred soon after the publication of his work, which seems to militate against the sacred and inviolable character attributed to these persons. It is that of Don Pantaleon Sa, brother to the Portuguese ambassador in England, who was tried, found guilty, and executed for an atrocious murder in the year 1653.

From the account given of this case by Zouch, the pupil and successor of Gentili in the professor's chair at Oxford, and who was also one of the judge delegates by whom the offender was tried, it appears that his plea of exemption as belonging to the ambassador's suite was overruled as insufficient. Had he been the ambassador himself, no doubt it would have been entertained that he must have been remitted to his own native forum for trial according to the

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<sup>v</sup> Ward's Hist. of the Law of Nations, vol. ii. p. 523.

<sup>w</sup> De J. B. ac P. lib. ii. cap. xviii. § iv.

opinion of Grotius and other publicists. But the authority of these writers, extending the exemption of extra-territoriality to the ambassador's suite, was rejected by the court, in which judgment Zouch himself concurred.\*

The conduct of Cromwell in this anomalous case is condemned by Leibnitz, as an infraction of the law of nations; and Bynkershoek, whose work *De Foro Legatorum* was published in 1721, states that he had not been able to find after diligent research, more than four cases previous to that period in which an ambassador, or the persons of his suite had been brought to trial and punishment in the country where they were accredited. He adds that all these cases were distinguished by peculiar circumstances, or condemned by the judgment of publicists; and even if they were not, that the examples of the application of the general rule far outweigh these exceptions as evidence of the general usage and opinion of mankind.†

§ 15 Wicquefort, (b. 1598, d. 1682,) l' Ambassadeur et ses fonctions.

One of the most remarkable works published during the seventeenth century on the subject of the rights and duties of ambassadors is that of Wicquefort.‡ This author was born at Amsterdam, in 1598, and became minister resident of the elector of Brandenburg at Paris, 1628. He continu-

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\* Rich. Zouchi, *Solutio quæstionis veteris et novæ de legati delinquentis judice competente*. Oxon. 1657.

† Leibnitz, *De Jure Suprematus ac Legationis Principum Germaniæ*, cap. vi. p. 14. Bynkershoek, *De Foro Legatorum*, cap. xviii. "Sic punita vides crimina legatorum et communia, et turbatæ reipublicæ, et quamvis forte disputari posset, esse in his exemplis facta quædam dubia, quæ ad hanc de foro quæstionem non pertinent, largiamur tamen, omnia pertinere, quin et plura forte addi posse, sed ne inde efficiamus, his exemplis jus gentium induci. Utique nemo negat, contra jus gentium committere, qui legatos violaverit, et nihilominus constat; plurimas gentes legatos violasse, sed id ipsis opprobrio, ut sunt qui opprobrio duxerunt illa ipsa, quæ recensui, pœnarum exempla. Hoc ausim adfirmare, exempla, quæ in adversam partem proferuntur, sive numero mus, sive pondere mus, semper et ubique vincere, et vicissè etiam apud illas gentes, quæ alias impetu abreptæ puniverant legatos."

‡ L'Ambassadeur et ses Fonctions, à Cologne, 1679.

ed in this post until 1658, when Cardinal Mazarin having intercepted his correspondence of an offensive character to the Cardinal's government, ordered him to leave the kingdom, and on his refusing, imprisoned him in the Bastile, from whence he was sent under an escort to Calais and embarked for England. On his return to his native country, Wicquefort was appointed, on the recommendation of the Pensionary John de Witt, historiographer of the republic and secretary interpreter of despatches. Whilst in these employments, Wicquefort received a secret pension from Louis XIV, was named by the Duke of Luneburg his resident at the Hague, and being accused in 1675 of revealing the secrets of the state to foreigners, was tried and sentenced by the supreme court of Holland to imprisonment for life. He remained in prison until 1679, when he escaped through the address and filial devotion of his daughter, and retired to Zell in Hanover where he died at the advanced age of eighty-five, in 1682.

The curiously chequered life of this intriguing adventurer might almost have furnished materials for his once celebrated treatise, which is rather of an historical than didactic character, and was written during his long imprisonment in Holland. He says: "for myself I do not promise a perfect treatise, both because the subject itself is inexhaustible, and because being written to relieve the weariness of a very severe captivity, it must bear marks of my insupportable sorrow, and of those infirmities common to all men and of which I acknowledge my full share. In my solitude I had no other company than a few books allowed by the indulgence of the fiscal, nor other amusement than that of reading. I thus collected several passages of modern history, which might serve, if not to the composition of a regular methodical treatise, at least to aid those who having besides more capacity than myself, could apply themselves with more assiduity and success. But my misfortunes having compelled me to renounce this idea, and having defeated all my plans, I substituted for



this original conception that collection of examples which has been published under the title of *Memoires touchant les ministres publics*. This work treats so fully of the exemptions, immunities, and privileges attributed to public ministers by the law of nations, that in order to give to it the shape of a regular treatise, it seemed to me to be sufficient to correct in this third edition the confusion and irregularity of the two former. I am quite aware that nothing I can say of it will constitute a science founded upon principles of mathematical demonstration, or from which certain and infallible rules can be inferred : but also I believe the entire work may be reduced to maxims wherein will be found something approaching to moral infallibility."

Certainly Wicquefort's treatise considered as a scientific work, deserves very little the character of "moral infallibility," which he so complacently attributes to it. It is in fact little more than a collection of historical examples, more or less bearing upon the subject, but arranged without any regard to method and the convenience of reference, and unconnected by any attempt at reasoning from analogy or clear development of principles.

§ 16. Bynkershoek, de foro legatorum.

Far different is the character of Bynkershoek's treatise *De Foro Legatorum*. The merits of this most excellent work is enhanced by the fact that it was written in the midst of other engrossing occupations, in great haste, and upon a particular case which had arisen in the supreme court of Holland of which the author was a distinguished member.\*

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\* Tam festinante calamo, ut nunc scriptum vides \* \* \* meminere etiam, me non aliter scribere, quam solent occupatissimi. *Præf. in fin.*

-Bynkershoek's treatise *De Foro Legatorum* was first published at the Hague in 1721. A translation in French by his cotemporary and friend Barbeyrac appeared in 1723 under the title *Traité du Juge compétent des Ambassadeurs*, of which Bynkershoek writes in a letter to the translator, 25th Dec. 1722. "Quod libellum meum *De Foro Legatorum* Gallice verteris, quod sententiam meam tam feliciter exprimeris, quod notis tuis eruditius illustraveris, quod denique ubi a me dissentis, tam amice dissereris,

In the *first* chapter of this treatise, Bynkershoek treats of the various grades and titles of public ministers, and shows that whatever may be their respective ranks and denominations they are all equally entitled to the protection of international law. He states that previous writers on this subject had confounded the Roman *legatus*, the deputy of a province or city of the empire sent to Rome on the business of his constituents, with the modern *ambassador* representing a sovereign state towards a foreign government. There is in fact but a single passage of the civilians which refers to *legatus* in the modern sense of a public minister.<sup>b</sup> The analogies of the Roman law could therefore shed but little light on the subject in question which must be examined on principle. He then proceeds to consider (ch. ii.) on what principle the question of jurisdiction in the case of ambassadors ought to be determined. He lays down, as the basis of his reasoning, the postulate that all civil jurisdiction is founded on the subjection of the person or property to the local sovereign. The civil jurisdiction of the courts of justice depends consequently on the domicil as to the person, and the *lex loci rei sitæ* as to property. But, he asks, how can the person or effects of an ambassador, who by a fiction of law is still supposed to retain his original domicil, and to reside in the state he represents, and whose personal property is governed by the same law which governs his person, be subject to arrest by the law of that country where he is accredited?

He illustrates his reasoning (ch. iii.) by the analogous case of a foreign prince, coming into the dominions of another sovereign, with the knowledge and consent of the latter. By the universal usage of nations he is considered as

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eorum omnium nomine ago tibi, quas debeo, gratias, relaturus etiam si potero," etc.

<sup>b</sup> Si quis *legatum* *hostium* pulsasset, contra jus gentium id commissum esse existimatur: quia sancti habentur legati. (Dig. lib. L. tit. vii. de *Legationibus*, leg. ult.

exempt from the local jurisdiction. Without going the length of Leibnitz,<sup>c</sup> in justifying the conduct of Queen Christina of Sweden, in trying and executing her chamberlain Monaldeschi in the castle of Fontainebleau, Bynkershoek affirms that a foreign prince may exercise over his own subjects such acts of sovereignty as do not impugn the sovereignty of the state in which he temporarily resides.<sup>d</sup> But what if the foreign prince commit crimes, or incur debts, during his passage through, or residence in the country? To this question Bynkershoek answers that the law of nations is founded on reason and usage. So far as mere *reason* is concerned there may be some difficulty in resolving the case supposed. But, he asks, if the ambassador, who represents the person of his sovereign, is exempt from the local jurisdiction, why not the sovereign himself? Shall the representative enjoy privileges greater than his august constituent? As to *usage*, the paucity of examples to establish any uniform rule must be attributed to the fact that sovereign princes rarely travel in foreign countries; and still more rarely commit robberies, murders, and incur debts whilst resident abroad. If some few instances of sovereigns arrested and punished for crimes, within the dominions of another sovereign, have occurred, it proves nothing. Zouch quotes four examples: 1. The so much debated case of Mary Queen of Scots.<sup>e</sup> 2. That of Robert King of Naples condemned by the Emperor Henry VII, at Pisa, whose sentence was reversed by the Pope because the Emperor was out of his dominions when he pronounced it. 3. Conraddin, the last of the illustrious Hohenstauffen, exe-

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<sup>c</sup> Leibnitz, *De Jur. Suprem. et Legat. Princip.* German. cap. vi. pp. 14-18.

<sup>d</sup> E. g. He may grant a title of honour to one of his own subjects. (Zouch, *De Jure Feod. inter Gent.* Pars ii. § 2, Quæst. 6.)

<sup>e</sup> For an account of the arguments of the English civilians upon this case, see Ward's *History of the Law of Nations*, Vol. ii. p. 564. Lond. ed. 1795.

cuted at Naples in 1266 by order of Charles of Anjou. All these precedents, Bynkershoek holds to be inapplicable, or considers them as constituting exceptions to the rule; and concludes that in extreme cases of violence, threatening the safety of the state, the person of the foreign sovereign may be arrested; but not for debt in any case.

As to the *property* of the foreign sovereign he holds (ch. iv.) that it may be seized to satisfy any just claims upon the property itself or upon the sovereign. This, of course, must be understood with the exception, implied by the permission to come into the country, that the personal effects of the foreign prince and his suite are exempt from the local jurisdiction on the same principle with those of his ambassador. He mentions the seizure for debts due to Dutch subjects of ships of war belonging to the king of Spain in 1668, which were restored by order of the States General, as our author thinks, on grounds of state policy, rather than of strict law which might well have justified such a judicial proceeding. But it is not easy to see on what legal principle such a proceeding could be justified, since a foreign public ship of war, sailing over, or stationed within the territory of another state, in amity with the sovereign whose flag and commission she bears, is clearly exempt from the civil and criminal jurisdiction of the place.<sup>f</sup>

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<sup>f</sup> This exemption is laid down by *Casaregi*, an Italian publicist, and judge of the tribunal called the Rota of Florence, who was a cotemporary of Bynkershoek, though the latter does not appear to have been acquainted with his writings. *Casaregi* was the editor of an edition of the *Consolato del Mare* in Italian, published at Venice in 1737, with a learned commentary. In his *Discursus legales de Commercio*, etc. (published at Florence in 1719,) he states that a sovereign cannot claim the exercise of jurisdiction in the seas adjacent to his territories, or within the dominions of another state: "exceptis tamen ducibus et generalibus alicujus exercitus, vel classis maritimæ, vel ductoribus etiam alicujus navis militaria, nam isti in suos milites gentem et naves libere jurisdictionem sive voluntariam sive contentiosam, sive civilem sive criminalem, in alieno territorio quod occupant tanquam in suo proprio, exercere possunt," etc. (Disc. 136.) The same principle was

Bynkershoek continues his main argument in chapters v. and vi. The reason on which the exemption of the ambassador from the local jurisdiction is founded is the same which exempts the sovereign whose representative he is. The ambassador is not considered as a subject of the state to which he is sent ; and consequently cannot be subjected to the local jurisdiction either for debts or crimes. Both the express and tacit consent of nations has established the rule that his legal domicil remains unchanged notwithstanding the removal of his person. Our author holds that the citations from the Roman civilians, with which the writings of preceding public jurists are filled to satiety, are foreign to the question. Though an eminent civilian he had delivered himself from the servile prejudices which induced them to consider the Roman code as of universal obligation, and to apply its rules as to provincial deputies to international ambassadors. He admits (ch. vii.) that the jurisprudence of his own country on this subject had fluctuated, and especially that of the supreme court of Holland, of which he was a distinguished member. But he is not willing to allow the inference that his judicial brethren were ignorant of public law, as Wicquefort, who was influenced by personal resentment against the judges, had

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judicially recognized in the Supreme Court of the United States of America in 1812, in the case of the ship *Exchange*, an American merchant vessel, which had been seized and confiscated by the Emperor Napoleon, subsequently commissioned as a French ship of war, sent with despatches to the East Indies, and being compelled by stress of weather to put into an American port, was reclaimed by the original owners. The American court determined that where there is no express prohibition, the ports of a friendly state are considered as open to the public armed and commissioned ships, belonging to another nation, with whom that state is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities on the same principle which exempts the person of a foreign sovereign and his ambassador within the territory. The commission in this case was considered conclusive to prevent any inquiry into the validity of the original seizure and confiscation. (Sparks' American Biography, vol. vi. p. 30. Life of Pinkney.)

pretended in his treatise *de l'Ambassadeur*. Similar variations would be found to have taken place in the decisions of that tribunal as to the interpretation of private law by a succession of judges constantly changing; and no wonder that the same thing should happen, as to a question of public law, on which, as Grotius had observed, "the sentiments of the most celebrated authors were opposed," "and where," says Bynkershoek, "public opinion must consequently be divided." He concludes that as "the Roman and pontifical law shed but little light on the question, it must be determined by reason and the usage of nations. I have already stated the reasons which may be alleged on both sides, and we must now see which ought to prevail. Doubtless it must be those which are confirmed by usage for the law of nations is thence derived."<sup>8</sup>

Having laid this broad foundation for his argument, he proceeds (chapter viii.) to consider what has been the approved usage of nations on this subject. First as to *civil* matters. He refers to Grotius' fiction of the extra-territoriality of public ministers, from which flows as a corollary their exemption from the civil laws of the country where they reside.<sup>h</sup> An ambassador is, in law, neither a subject of the state, nor an inhabitant of the country. He has not come to establish his domicil among us: he is an alien who abides with us merely to transact the business of his own sovereign.<sup>i</sup> Whoever, then, has a civil claim against

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\* \* \* Ut ait Grotius, (De J. B. ac. Pac. lib. ii. cap. xviii. § 4, No. 1,) *varie a claris hujus seculi ingeniis est tractata, et ubi, si unquam, sciaditur incertum studia in contraria vulgus. Jus Romanum et Pontificum vix suppetias ferunt, ratio et mores gentium rem totam absolvunt. Rationes pro utroque sententia expediendi, quæ prevaleant, nunc questionis est, ille autem prævalent quas usus probavit, nam inde jus gentium est.* (Bynk. de Foro Legatorum, cap. vii. ad fin.)

<sup>h</sup> Grotius, de J. B. ac P. lib. ii. cap. xviii. § 4, No. 5.

<sup>i</sup> Legatus non est civis noster, non incola, non venit ut ad nos domicilium, hoc est, rerum et fortunarum sedem transferat; peregrinus est, qui apud nos moratur, ut agat rem principis sui. (Bynk. de Foro Legat. cap. viii.)

an ambassador, must proceed against him exactly as if he were not in fact resident in the place where he is accredited, as if he had not contracted there, as if he had no property there in his quality of ambassador. The only possible mode of escaping this consequence is to receive the ambassador upon the express condition that he shall be subject to the local jurisdiction. If he be received without such a reservation, the condition is tacitly implied that he is to be exempt from this jurisdiction, at least in civil matters. The general consent of nations concurs to establish this as the law of nations. On this part of his subject, he cites the words of Grotius : " In respect to the personal property of an ambassador which is to be considered as incident to his person, it cannot be attached, nor taken in execution, neither for the payment, nor for the security of a debt, neither by the ordinary process of a court of justice, nor by the extraordinary interposition of the local sovereign : such, in my opinion, is the best founded doctrine. For an ambassador, in order to enjoy complete security, ought to be exempt from all constraint, in respect to his person and those things which are necessary to him. If then he has contracted debts, and if, as is usually the case, he has no real property in the country, he should be respectfully requested to make payment ; and in case of refusal, application ought to be made to his sovereign : after which, such proceedings are taken against him as are usually practised with respect to debtors, within another jurisdiction."<sup>\*</sup> Bynkershoek also refers to Huberus, Moëmac, and Wicquefort, to show that this principle of Grotius had become firmly established in the usage of nations at the time when he wrote. He fortifies the position by a number of historical examples, where the exemption had been allowed by different European states, and of laws made by various governments to enforce the privileges of

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<sup>\*</sup> De J. B. ac P. lib. ii. cap. xviii. § 9.

public ministers. In chapter ix, he comments on the edict of the States General of 1679, which declares that "the persons, domestics, and effects of ambassadors, or ministers, coming into this country, here residing, or passing through, shall not, for any debt they may have contracted, be arrested, seized, or detained, neither on their arrival, during their residence, nor at their departure from the country, and the inhabitants are to govern themselves accordingly in making contracts with the said ambassadors and their domestics."<sup>1</sup> Is this edict more liberal than the law of nations in the extent of the immunities it accords to foreign ministers in Holland? Bynkershoek says it goes beyond the international law, inasmuch as by its general terms it includes in the exemption from arrest in civil cases all ambassadors, even those passing through the country, without being accredited to the government. Yet the States General delivered up the Swedish minister, Baron de Goertz, in 1717, on the demand of the British government, on the ground that he was not accredited to them. The equity of the edict extends to *all debts*, whether contracted in the country or elsewhere; and in general this law accords perfectly with the above precepts of Grotius, of which Bynkershoek entirely approves, and which have ever since been recognized in the practice of nations.

In chapter x, he again recurs to his fundamental principle that the foreign minister is to be considered as still retaining his original domicil. He is consequently to be proceeded against, in the competent court of his own coun-

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<sup>1</sup> "Dat de Personer, Domestiquen of Goederen van uytheemse Ambassadeurs of Ministers, hier te Lande komende, residerende of passerende, ende eenige Schulden contractarende, nog op haare aankomste, nog gedurende haar verblyf, nog op haar vertrek van hier, sullen mogen werden gearresteert, gedetineert of aangehouden voor eenige Schulden, die sy alhier te Lande sonden mogen hebben gecontracteert, en dat Ingesetenen hare onderhandelinge met de voorszr uytheemseche Ambassadeurs en hare Domestiquen daar nakonnen reguleren." (Edict of the States General, 9th Sept. 1679.)



try. Nor can the ambassador set up the plea of absence in the service of the state in bar of such a suit in the domestic forum, since the law supposes him still to be present; and an exemption from being sued during a long protracted absence would be attended with consequences too injurious to other parties to be tolerated. The only exception to this rule is that of a special exemption granted by his own government, of which Bynkershoek mentions a curious instance in the case of the Dutch ambassador sent to England in 1643, to whom the States General granted an exemption from being sued in the courts of his own country during his absence.<sup>m</sup>

There seems to have been some doubts at the time when Bynkershoek wrote whether the immunities of public ministers extended to *consuls*. Leibnitz maintained he affirmative:<sup>n</sup> but Bynkershoek asserts the contrary, and grounds himself on the usage of nations attested by the best authorities, with the single exception of certain conventions made by the Christian states of Europe with the Sublime Porte and other Mohammedan powers.

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<sup>m</sup> Quia legatione domicilium non mutavit, nec forum mutasse intelligendus est, atque adeo convenietur in loco, unde in legationem profectus est, si judex ejus loci, ante protectionem, legati fuerit judex competens, vel quicumque alius ejus fuerit judex in imperio principis, qui legatum misit. Quod si nullibi ante protectionem habuerit vel domicilium, vel judicem, non est nisi ad supremum judicem principis, a quo missus est recursus. Neque legatus ibi conventus excipiet se reipublice causa abesse, atque adeo se invitum in jus vocari non posse, cum, fictione judicis habeatur pro presente ne ulli cæteroquin ullius judicis foro subjici possit. Quod quam inutile esset maxime in iis qui perpetua legatione funguntur, res ipsa loquitur. Non, inquam, excipiet, legatus, nisi speciale privilegium habeat; quale anno 1643, Ordines Generales uni legatorum suorum, quos tunc mittebant in Angliam, dederunt, ne scilicet lites inchoatas contra eum persequi liceret, sed manerunt in statu in quo erant, neve etiam novæ instituerentur, quamdiu ipse abesset, et sex post reditum ejus septimanas. (*De Foro Legat.* cap. x.)

<sup>n</sup> Leibnitz grounds himself upon the usage of allowing foreign consuls to exercise in certain cases, jurisdiction over their fellow subjects, from which he infers that the consul himself must be exempt from the local jurisdiction. (*De Jur. Suprem. ac Legat. Princip. Germaniæ*, cap. vi.)

In chapter xi, he examines the question whether a subject of the country, who is accredited as a minister to the government of that country, is entitled to the same immunities with any other ambassador? Wicquefort, he says, warmly contends for the affirmative; but Bynkershoek, on the other hand, insists that a subject of the country, previously resident within its territory, cannot be said to have changed his domicile by the mere fact of being named ambassador of a foreign power. Not that a subject may not become naturalized in another state by actually changing his domicile, and return to his native country clothed with the character of ambassador from his adopted country.<sup>o</sup> The question relates to one who had not changed his domicile and national character. One may become ambassador of a prince without becoming his subject. One may be faithful to his native allegiance, and, at the same time, faithfully perform the duties of a minister of a foreign prince. Bynkershoek asks, with what seems malicious irony, do we not see many ambassadors residing among us against whom nobody complains? who are guiltless of offences against the state, and who, if they were its subjects, would have to fear neither process nor prison? The subject who wishes to be employed in this capacity, and is conscious of his own frailty, ought to change his residence and his national character *bona fide*. Otherwise, as Hüb-

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\* In the first book of his *Quæstiones Juris Publici* he asserts the right of expatriation by a *bona fide* change of domicile and allegiance; states that it was recognized by the European publicists previous to his time including Grotius, and only denied by despotic governments, such as that of Muscovy. It was first prohibited in France by the edict of 13th August, 1669, the same year when Louis XIV began to violate the edict of Nantz and persecute the Protestants. "Before that period it was lawful to emigrate from France, and it is so still wherever the country is not a prison." Ludovicus quoque XIV, Franciæ Rex edicto 13 Aug. 1669 capitis bonorumque pœnam statuit, si quis Francus, venia ab ipso non impetrata, Franciam relinqueret animo non revertendi. Ante eum annum ibi licuit, et ubique licet, ubi civitas carcer non est. (Q. J. Pub. lib. i. de Rebus Bellicis, cap. xxii.)

erus says, he withdraws his office, but not his person from our jurisdiction.<sup>p</sup> Bynkershoek concludes that an ambassador, the subject of the state where he is accredited, who has contracted a debt, or rendered himself culpable of crime, in matters foreign to his official duties, is amenable to the civil and criminal tribunals of the country. Wicquefort strives hard to maintain the contrary position. But his judgment was warped by resentment for his supposed personal wrongs, the history of which Bynkershoek recounts in the same manner we have previously stated. The weight of his authority, not very considerable in itself, was necessarily much diminished by the circumstance of his being judge in his own cause.<sup>q</sup> Chapter xiiith relates to the antiquated topic of jurisdiction in the case of cardinals, and other ecclesiastical persons, appointed ambassa-

<sup>p</sup> Alioquin qui subditum nostrum elegit legatum, non videtur hoc agere, ut hominem sed ut officium ejus eximat, ut recte Hüberus de Jure Civit. Lib. iv. sec. 4, c. 2, n. 28.

<sup>q</sup> Magnis animis hæc questio tractata est, præsertim a Wicquefortio, qui, ut poeta ait, Κατὰ μέγεθος ἄνθρωπος, omni studio contendit, subditum nostrum, dum apud nos legatione fungitur, nostra jurisdictione eximi, et concedere in jurisdictionem principis legantis. \* \* \*

Wicquefortio nempe sedebat alte mente repostum, quod ipse, qui Amsterdamini natus erat, Hagæ habitaverat, et in fide stipendio fuerat Ordinum Generalium, etiam postquam Ducis Luneburgensis actor esse cœperat, titulo *Residentis*, a curia Hollandiæ apprehensus, et 20 Dec. 1675, damnatus erat ad perpetuas carceres, publicatis bonis. De ipsa sententia nihil dicam, quam curiam eum, quamvis legatum, damnasce, quod secreta reipublicæ, quæ celare oportuerat, illicitis literarum commerciis revelasset. Hinc ille lachrymæ, hinc jus gentium violare acerbe questus, primum suppresso, deinde aperto nomine jura legatorum vindicavit, et post, quicquid est ejus argumenti, exposuit justo opere, cui non est aliud, quod præferamus. Cæterum ut ipse in sua causa judex est incompetens, sic nec rationes ejus me moverint in aliam, quam supra defendi, sententiam, legatum scilicet manere subditum, ubi ante legationem fuit, atque adeo, si contraxit aut deliquit, subesse imperio, cujus antea suberat. His autem consequens est, nostros subditos, quamvis alterius principis legationem accipiant, subditos nostros esse non desinere, neque forum, quo semper uni sunt, jure subterfugere. (*De Foro Legat.* cap. xi.)

dors. In chapter xiii, he lays down the principle, now become incontestible, that the relative rank of public ministers has nothing to do with the question of their privileges, all being exempted, whatever may be their title. Chapter xiv treats of the merchant ambassador, or public minister carrying on trade; in respect to which, Bynkershoek refers to the case of the resident of the duke of Holstein at the Hague, which gave occasion to his writing this treatise. The supreme court of Holland determined in favour of the validity of the seizure of his effects, for a debt which he had contracted as a merchant, excepting the furniture of the minister's hotel, and other things necessary to the embassy. Bynkershoek seems to think the court were right in their judgment, though some of the positions asserted by them might be questionable. The case was still pending when he wrote in 1721, and also when Barbeyrac's translation was published in 1723, the minister having complained to the States General who hesitated what to decide. But our author is quite clear that an ambassador, who turns merchant, is liable to be treated as such, so far as respects the seizure of his stock in trade for commercial debts. He also speaks incidentally of the abuse of the privilege of exemption from duties, on articles imported for the minister's use, which Callières states had begun to be corrected in Spain and at Genoa at the time when he wrote in 1716.<sup>r</sup>

In chapter xv, Bynkershoek lays down the principle that the minister's suite, including his domestics, are, by the usage of nations, exempt from the civil jurisdiction of the country. As to domestics, who are subjects of the state where the minister is accredited, it would seem that they ought not to be exempt from the local jurisdiction.

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<sup>r</sup> Callières, *de la manière de négocier avec les Souverains*. Paris, 1716. This work relates rather to the art of negotiation, than to the theory of public law. Its author was a member of the French academy, and minister of France at the congress of Ryswick.

But Bynkershoek holds the contrary, on the ground that the domicil of the minister, who by a legal fiction is still supposed to reside in his own country, draws after it that of his domestics, though they may happen to be native subjects of the state where he is accredited. On entering his service they change their national character. Whether the civil jurisdiction over them is to be exercised by the ambassador himself, or whether the creditors are to be referred to the tribunals of his country, depends on the decision of the sovereign whom he represents. The same immunity extends to the minister's wife and children.

In chapter xvi, Bynkershoek explains what he supposes Grotius to mean in the passage above cited as to proceeding against an ambassador having no real property in the country, in the same manner as is practiced in respect to debtors domiciled without the territory.<sup>a</sup> The public minister may be proceeded against by attaching his goods, in those countries where that process is known and practiced, i. e. such goods as he may possess, not in the quality of ambassador, but as a private individual. From this liability Bynkershoek excepts all sorts of provisions for the use of himself and family, household furniture, clothing, ornaments, carriages, horses, and in short every thing which in the technical language of the Roman law is included in the denomination of the furniture and equipage of a *legatus*.<sup>b</sup> But he holds that none of these are exempt from attachment, unless they are destined for his personal use or that of his family; whilst those are liable which constitute the stock in trade of what he calls a merchant ambassador.<sup>c</sup>

<sup>a</sup> Si quid ergo debiti contraxit, et, ut fit, res soli eo loco nullas possideat, ipse compellendus erit amice, et, si detrectet, is qui misit; ita ut ad postremum usurpentur ea, quæ adversus debitores, extra territorium positos, usurpari solent. (De J. B. ac Pac. Lib. ii. cap. xviii. § 9.)

<sup>b</sup> \* \* \* et quæ alia prolixo nomine *legati instructi et cum instrumento* comprehendi possunt. (Bynkershoek, De For. Legat. cap. xvi.)

<sup>c</sup> Hæc autem omnia tunc demum excipio, si ad usum legati ejus re familiaris pertineant, non triticum, vinum, oleum, quod legatus in horreis repossue-

It may, however, we think, be doubted whether it would be considered as law, at this day, that any portion of an ambassador's goods could be attached, for the purpose of compelling him to defend a suit, and thus rendering him, against his will, amenable to the local jurisdiction of the country where he is accredited. Bynkershoek supposes that he has proved (in chapter iv) that the property of a foreign sovereign, found within our territory, may be attached for debts due to private individuals. But, as we have shown, *that* must depend upon the circumstances under which the effects *may* have come within our territorial jurisdiction. The personal effects of a foreign sovereign, travelling or residing within the territory by permission of the local sovereign, or foreign ships of war and troops coming into it by express permission, or that tacit consent which is implied from the absence of any prohibition, are clearly exempt from seizure for debt or on any other pretext. The immunity of a foreign minister rests on the same ground of tacit consent implied in the unconditional reception of the minister. He may indeed, with the license of his own sovereign, confer jurisdiction on the local tribunals by commencing a suit, and in that case must defend himself against all collateral proceedings incident to the principal suit as well as on appeal in the last resort. As to the attachment of the funds and stock in trade of a merchant ambassador, Bynkershoek himself admits the difficulty of distinguishing in the case of bills of exchange, money, &c. for these are necessary to his support as ambassador, and the origin of these funds cannot therefore be enquired into. The same difficulty must occur in the very rare and improbable case of goods actually forming the stock in trade of a merchant ambassador being attached for

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*rit ad mercaturam, non equos et mulos, quos legatus hippocomus alit, ut vendat. Merces legati, ut res mobiles ab arresto non magis immunes erunt, quam res immobiles, quia sine illis recte exercetur legatio, neque adeo earum detentio ullis legatis, quæ legatis, impedimento est. (Ib.)*

his commercial debts. His assuming such an incompatible character ought rather, in our opinion, to be made the ground of complaint to his government, than to furnish a pretext for judicial proceedings which might jeopard the security to which the ambassadorial character is justly entitled.

Our author arrives in chapter xvii, to that part of his subject which relates to *criminal* jurisdiction. We have already seen what was his opinion of the remarkable case of Don Pantaleon Sa, brother of the Portuguese ambassador in London, who was tried, convicted, and executed for murder in the time of the English commonwealth.\* In examining the general subject, he lays out of question the case of an ambassador, whose acts of violence, whether directed against the state, or against individuals, may rightly be repelled by force on the just principle of self defence. The question is, in ordinary cases, where the ambassador charged with a criminal offence, is to be tried? Here he distinguishes between ordinary crimes against individuals, and those which involve the safety of the state. He first examines the question on the mere footing of reason; and states the opinion of Grotius, who treats it as a competition between two social principles, the utility of punishing crimes, and the utility of respecting the privileges of ambassadors without which the pacific intercourse of nations could not be maintained. In order to determine which outweighs the other, we must have recourse to the general opinion of mankind, *voluntas gentium*. Precedents alone are insufficient, because contradictory. We must therefore resort to the judgments of wise men and conjectures, as to the general opinion of mankind.† But Bynkershoek holds

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\* Vide ante, § 13.

† Ipse Grotius utilitatem pœnæ exigendæ et utilitatem legationis, tuto obeundæ, invicem committit, et quæ sit, ex voluntate gentium derivandum esse recte censet, sed hoc inquit, ex solis exemplis evinci non potest: exstant enim satis multa in utramque partem. Recurrendum igitur tum ad

that examples of what has occurred in the world are of more weight than the mere authority of the learned, or conjectures, i. e. reasons drawn from the presumed consent of nations, Grotius himself showing that no precise conclusion can be drawn from these opinions.\* We must therefore appeal mainly to the judgment of nations in order to resolve the question whether an ambassador charged with a criminal offence is still under the protection of the law of nations? and if so, whether the rule applies indiscriminately to all sorts of crimes? This judgment can only be known by *examples*, of which there is an abundant harvest. Bynkershoek believes that these examples sufficiently prove that an ambassador cannot be tried and punished in the place where he is accredited, but must be proceeded against in the manner subsequently pointed out by Grotius i. e. by ordering him to leave the country; and where the crime is atrocious, and affects the welfare of the state, sending him back to his master, with a demand that the latter should punish him, or deliver him up for punishment. He also permits, in order to obviate an imminent danger to the state, that the ambassador shall be arrested and interrogated.† Bynkershoek subscribes implicitly to the general rule laid down by Grotius, and even extends it to the case where the danger is still imminent, saving always the right of self defence of which he had before spoken. He says that Grotius justly concludes that the special utility of respecting the rights of legation outweighs the general utility

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*sapientium judicia, tum ad conjecturas, et mox depromet illa judicia, illasque conjecturas, tanquam totidem sententiæ suæ, quam n. 5 exponit, prænuncios.* (Bynkershoek, De For. Legat. cap. xvii.)

\* Rationes, quæ pro se quisque offerant, nihil definite concludunt, quia jus hoc, non ut jus naturale, ex certis rationibus certo oritur, sed ut voluntate gentium modum accipit. (Grotius, de J. B. ac P. lib. ii. cap. xviii. § 4, n. 2.)

† \* \* \* ut obviam eatur imminenti periculo, si nulla est ratio idonea, et retineri, et interrogari legatos posse. (Grotius, de J. B. ac P. lib. ii. cap. xviii. § 4, no. 6.)



of punishing crimes : because, after all, it is not to be supposed that the particular offence will necessarily escape punishment, since if the offender's sovereign declines doing justice, the injured nation may resort to war in a case of sufficient gravity to justify such a course. Whereas if he is liable to criminal process, he might be accused of crimes every day upon some pretext or other ; for, as Grotius adds, as the political views of the power which sends, and of that which receives an ambassador, are usually different and often opposed, some specious pretext might always be found on which to ground a criminal charge.\* It is not necessary to suppose extreme cases of monstrous tyrants who send spies and conspirators under the mask of ambassadors. Even in case of conspiracy against the state, it is better to tolerate some temporary inconveniences than to violate general rules, the sacred observance of which is so important to the common weal.

Bynkershoek then proceeds, (chapters xviii and xix) to support the opinion of Grotius by examples of what had occurred in the intercourse of nations from the earliest times, throwing out of consideration the anomalous cases, where the rights of public ministers have been violated by tyrants or lawless communities, discarding all that the general sense of mankind has ever considered as sacred. Indeed the sacredness of the ambassadorial character is one of the very few principles of international law which may be traced up to the earliest antiquity, and there is hardly any race however barbarous which has not shown some decent regard for this social principle. We can hardly open an author of classic antiquity, historian, poet, philosopher, or jurist, who does not affirm it even when specifying instances of its violation. The examples of cases where the rights of ambassadors have been respected even to the

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\* Nam, ut optime subjungit Grotius, cum plerumque diversa, sæpe et adversa sint consilia eorum qui mittunt legatos, et qui accipiunt, vix est, ut non semper aliquid in legatum dici possit, quod criminis accipiat speciem.

length of letting their crimes go unpunished, far exceed, both in number and weight, those of immunities unsuccessfully asserted against lawless violence. Still he admits, with Grotius, that in case of pressing necessity the ambassador may be arrested and interrogated. Henry IV, who both understood and observed the law of nations, arrested the secretary of the Spanish ambassador who was concerned in a plot to deliver up Marseilles to the Spaniards in 1605; and on the ambassador's complaining, he declared that even public ministers might be arrested in such a case.<sup>a</sup> But he surrendered the secretary to his chief upon condition that he should leave the kingdom. And the minister himself may be sent out of the country, without applying to his master, where circumstances do not admit of delay.<sup>b</sup> In support of this position Bynkershoek cites nu-

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<sup>a</sup> Henricus IV. Francie Rex, juris gentium fuit peritissimus et simul tenacissimus. Cum is scribam legati Hispanici, hostilia molientem, detenuisset, ad querelas legati respondit, ipsos etiam legatos in ea specie detineri posse. Reddidit deinde scribam legato, sed ea lege, ut eum juberet imperio excedere. (De Foro Legat. cap. xix.)

<sup>b</sup> Among other cases Bynkershoek refers to that of Gyllenburg, Swedish minister in England, accused in 1716 of plotting with the famous adventurer Goertz in favor of the Pretender, which conspiracy was connected with a meditated invasion of the kingdom by Charles XII of Sweden. The minister was arrested, his papers searched, and he was afterwards sent out of the kingdom. This course was justified by the British government on the ground of necessary self defence. (Martens, *Causés célèbres du Droit des Gens*, tome ii. p. 548.) Speaking of this case, Lord Mahon says: "A foreign minister who conspires against the very government at which he is accredited, has clearly violated the law of nations. The privilege bestowed upon him by that law rests on the implied condition that he shall not outstep the bounds of his diplomatic duties,—and whenever he does so it seems impossible to deny that the injured government is justified in acting as its own preservation may require." (History of England from the peace of Utrecht to the peace of Aix la Chapelle, vol. i. p. 389.) Another remarkable case in this connection, which Bynkershoek has not mentioned, is that of Cellamar the Spanish Ambassador in France who was arrested in 1718, for having conspired against the government of the Regent, Duke of Orleans, together with his secretary of legation, and after being interrogated

merous examples, and mentions a case quoted by Antonio de Vera (in his *Parfait Ambassadeur*, liv. i. ch. 33,) in the time of Philip II, where that monarch, having violated the pretended right of asylum of the Venetian ambassador at Madrid, by forcibly taking some criminals out of his house, wrote to all the princes of Christendom that if his ambassadors were guilty of crimes, they should be considered as having forfeited their privileges, and be tried by the local laws.<sup>c</sup> Supposing this rule to have been laid down at that time by Spain, the question arises whether that power had a right to introduce this innovation? Doubtless Philip II might renounce the privileges of his own ministers;—but the question arises whether any one nation, can, by its own act, take away the immunities which belong, by the law of nations, to ambassadors? Bynkershoek holds that it may, because these privileges depend upon tacit consent, implied in the reception of the ambassador from a foreign state, and may be taken away by annexing the condition that he shall submit to the local jurisdiction. We shall hereafter examine the grounds of this opinion.

Having already established (in chapter xv) that the domestics, and other persons in the suite of an ambassador, are subject to the same and no other civil jurisdiction, with

and his papers seized, was sent with an escort to the frontiers. (Martens, *Causes célèbres*, etc. tom. i. p. 139.)

<sup>c</sup> Sed regem Hispaniarum ea occasione literas dedisse ad omnes principes Christianos, quibus sibi placere significavit, ut, si legati sui penes eos delinquerent, cecidisse viderentur privilegiis suis et judicarentur secundum leges imperii ubi essent. (De For. Legat. cap. xix.)

Antonio de Vera, author of the work above quoted by Bynkershoek, was the Spanish ambassador at Venice in the first part of the seventeenth century. His work was first published in the Spanish language in 1621, under the title of *El Embaxador, sue de legati munere*, and subsequently translated into French, and published at Paris in 1642 under the title of the *Le Parfait Ambassadeur*. It was written in the form of a dialogue between *Louis* and *Julius*, these two interlocutors being intended to represent Don Louis de Haro and Cardinal Mazarin.

the minister himself, he infers, (chapter xx) as a corollary from this principle, their analogous exemption from the criminal jurisdiction of the place where the mission is accredited. Every example to the contrary is an example of usurped jurisdiction which cannot affect the question of right. The minister may, at his discretion, deliver up a servant accused of crime, or he may renounce his privilege in this respect as to all, except the persons of his suite appointed by the sovereign, as the secretaries of legation, etc. but otherwise the local police has no authority over them. Whether the minister can exercise this jurisdiction depends on the joint consent of his own sovereign and that of the state where he is accredited. Otherwise he may secure their persons and send them to their own country for trial.

Chapter xxi treats of the question whether the hotel of an ambassador ought to be considered an asylum for criminals?

This depends on the consent of the local sovereign, the general law of nations recognizing no such privilege.<sup>d</sup> The exemption of the minister's dwelling is only in favour of his person, his family, and suite, with their effects, which are equally exempt wherever they may be situate. Consulting the light of reason alone, nothing can be more absurd than this pretended right of converting the house of a public minister into an asylum for offenders against the laws of the country.<sup>e</sup> This monstrous pretention has been sometimes pushed the length of whole streets and quarters of a populous city; such as that which gave rise to the famous contest in 1687 between Louis XIV and Pope

<sup>d</sup> Jam de domo legati videamus. Recte Grotius dixit magni operis lib. ii. c. 18, § 8, an jus asyli habeat legatus pro quibus vis eo confugientibus, ex concessione pendere ejus apud quem agit, neque enim juris gentium case. (De For. Leg. cap. xxi.)

<sup>e</sup> Sane si ex ratione agamus, dubito, an quicquam magis fatuum excogitari possit quam jus asyli legatorum sedibus tribuere. (Ib)

Innocent XI. It was abolished at Madrid in 1684 without much opposition.

In chapter xxii our author inquires whether there are any special cases in which an ambassador may be arrested?

A subject of the country is banished and returns with the character of ambassador. We are not obliged to receive him, but cannot punish him. We can only order him away, and if he refuses, expel him by force from the territory. As to the right of retaliation for injuries done to our ministers contrary to the law of nations, we can only exercise it by withdrawing from those of the same power their accustomed privileges.<sup>f</sup> So of general reprisals against the persons and property of a nation which has injured us, and refuses redress, they can never be justly extended to ambassadors who are residing in the country under the protection of the public faith. Ambassadors sent from the enemy,—*flagrante bello*, have almost universally been considered, in all ages and by all nations, as entitled to the protection of the law of nations. Our author supposes that the Roman feacial law did not extend this protection to the case of ambassadors sent in time of peace without any view to an impending war.<sup>g</sup> And he infers that it

<sup>f</sup> Ὑπερὶ justitiæ negari potest, justitia non etiam, quia illa voluntaria est, hæc autem necessaria. Quare ejus legatis, qui nostros male habuit, vim inferre non licebit, sed forte habere licebit ut subditos, negatis legatorum privilegiis, quæ moribus Gentium vulgo introducta sunt, et ad ὑπερὶ justitiæ pertinent. Atque hoc mihi justum videtur, cum sic ipsi legato nulla fiat injuria, sed soli qui misit. Alii aliter sapiant. (De For. Leg. cap. xxii.)

<sup>g</sup> It is difficult to understand how a writer so deeply versed in the Roman law, and gifted with such great powers of discrimination could put such a construction upon the text of the juriconsult Pomponius, which plainly asserts the immunity in question. "Et ideo, si quum legati apud nos essent gentes alicujus, bellum cum iis indictum sit, responsum est, *liberos eos manere*, id enim juri gentium conveniens esse." (Lib. i. tit. vii.) But Bynkershoek supposes that this may refer merely to ambassadors sent dur-

may be doubtful whether these are entitled, even in modern times, in point of strict law, to be exempted from being involved in the common lot of their fellow-subjects who may happen to be in the country on the breaking out of war. Still he admits that the approved usage of nations, at the time when he wrote, with the exception of certain Mohammedan states of Asia and Africa, entitled them to be protected from reprisals and sent away in safety.

In chapter xxiii, Bynkershoek examines the important question, whether an ambassador may renounce his privilege of *renvoi*, and submit to the jurisdiction of the local forum?

He first refers to the maxim of the Roman law that consent gives jurisdiction to an otherwise incompetent tribunal, (Dig. lib. v. tit. i. De Judiciis, leg. i.) which, he says, is applicable provided the parties dispose of their own rights only. An ambassador may certainly renounce any privilege or exemption introduced for the benefit of his embassy, but not without the consent of his sovereign, because it is not a mere private right. In *criminal* matters, at least, he can never renounce the privilege of *renvoi* to the forum of his domicile without the express permission of his own sovereign. In *civil* matters, the ambassador may perhaps consent that the local tribunal shall judge and pronounce, but not execute its sentence to the detriment of the affairs of his legation. This he may do, either by commencing a suit as plaintiff, or defending one commenced against him. Our author states these positions as the result of reasoning applied to the nature and object of the privileges in ques-

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ing war, such as foreign nations usually deputed to the Roman people; resident ambassadors being then quite unknown; and that the application of this law ought to be strictly confined to the case of a *legatus* sent after the actual breaking out of hostilities, but before the solemn declaration required by their social law. His translator, Barbeyrac, has furnished the answer to this strained interpretation. (Du Juge compétent des Ambassadeurs, ch. xxii. § 6, note (2).)

tion, but confesses he had not been able to collect a sufficient number of precedents to determine what was the approved practice of nations. He therefore seeks for some support to his reasoning in the analogies of the Roman law, the authority of which he is generally disposed to repudiate in these discussions relating to modern international law.<sup>f</sup>

In his xxivth and last chapter, Bynkershoek reviews the opinion of preceding jurists, most of whom followed the false analogy of the Roman law as to the *legati* or deputies of provinces, which they confound with the ambassadors of foreign states. He closes a long list of these learned persons with the name of his cotemporary and friend, Barbeyrac, who, in his notes to the translation of Puffendorf's treatise on the Law of Nature and Nations, had stated that ambassadors are not, in general, punishable by the prince to whom they are accredited, but adds, "Lors même que la chose presse, il est permis de se saisir d'abord de la personne de l'Ambassadeur, comme d'un ennemi déclaré, de le tenir en prison, et même de le faire mourir, si cela est nécessaire pour nôtre conservation."<sup>g</sup> To which last alternative Bynkershoek makes no objection, provided it be really necessary to our safety, which he conceives can rarely happen, unless in case the ambassador has taken

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<sup>f</sup> Ego vero, quicquid earum rerum sit, non ausim dicere, legatum, inconsulto principe, juri suo renunciare posse. Ad quid enim legatorum privilegia, quam ut ipsi principibus suis utiles sint, et eorum legatio nulla re impediatur? Magis igitur hæc privilegia pertinent ad causam principis quam ipsius legati, sibi renunciatione sua legatus nocere potest, principi non potest. Atque ita, consulta ratione, forte dicendum est, legatum in causa delicti nunquam privilegio fori renunciare posse in causa civili, non aliter, quam ut adversus eum jus dicatur, non ut sententia executioni mandetur, si quid per eam impediretur legatio, ut in causa criminali tantum non semper impediti solet. Sed ad manum non sunt ea gentium exempla, ut ex jure gentium ea de re possim constituere. Ratione quam dixi argumentum præbet, l. 24, § ult. ff. de Judic. (De Foro Legat. cap. xxiii.)

<sup>g</sup> Droit de la Nature et des Gens, liv. 8, ch. 9, § 12, note.

up arms against us and is slain in open combat.<sup>h</sup> In another work, written subsequently to his treatise on the Competent Forum of Ambassadors, Bynkershoek has examined incidentally several questions, rather curious than useful, respecting the rights of legation. Among these, however, he considers one, which at the time when he wrote does not appear to have been clearly settled, though it can hardly at this day admit of a doubt, though it is generally avoided in practice by expressly reserving in treaties, and in the full powers under which they are concluded, a ratification by the contracting parties, as essential to their validity. In the second book of his *Quæstiones Juris Publici*, (cap. vii.) he propounds the question, whether the sovereign is bound by the acts of his minister contrary to his secret instructions? According to our author, if this question were to be determined by the ordinary principles of private law, the principal is not bound where the agent exceeds his powers. But in the case of an ambassador, we must distinguish between the general full power, which he exhibits to the prince to whom he is accredited, and his special instructions which he may, and generally does, retain as a secret between his sovereign and himself. He quotes the opinions of Grotius and Gentili, that if the minister has not exceeded the authority given him in his patent credentials, the sovereign is bound to ratify, though the minister may have deviated from his secret instructions. Bynkershoek admits that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of this authority.

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<sup>h</sup> Non intercedo, si aliter res salva esse nequeat, salus populi, salus principis, suprema lex esto. Sed fere semper res aliter salva esse potest, si non manu agat legatus, et tumultuaria cæde succumbat. Expulsio vel custodia legati alioquin suffecerit, ut salutis nostræ consulamus. Vides, lector, quot capita, tot fere sententias, tuum erit in hoc depræliantium hominum certamine discernere, quis justius induit arma. (De For. Legat. cap. xxiv.).



But the credentials given to plenipotentiaries are rarely special, still more rarely does the secret authority contradict the public full power, and most rarely of all does a minister disregard his secret instructions.<sup>i</sup> But what if he should disregard them? Is the sovereign bound to ratify in pursuance of the promise contained in the full power? According to our author the usage of nations, at the time when he wrote, required a ratification by the sovereign to give validity to the solemn compacts concluded by his minister, in every instance, except in the very rare case where the entire instructions were contained in the patent full power. He controverts the position of Wicquefort, (*Ambassadeur et ses Fonctions*, liv. 2, sec. 15,) condemning the conduct of those princes who had refused to ratify the acts of their ministers on the ground of their contravening secret instructions. The analogies of the Roman law and the usages of the Roman people were not to be considered as an unerring guide in this matter, since time had gradually worked a change in the usage of nations, which constituted the law of nations; and Wicquefort himself, in another passage, had admitted the necessity of a previous ratification.<sup>k</sup> Bynkershoek does not however deny that if the minister has acted precisely in conformity with his public full power, which may be special, or his secret in-

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<sup>i</sup> Sed rarum est, quod publica mandata sint specialia, rarius quod arcanum mandatum publico sit contrarium, rarissimum vero, quod legatus arcanum posterius spernat, et ex publico priori rem agat. (Q. J. Pub lib. ii. de Rebus varii Argumenti, cap. vii.)

<sup>k</sup> Sed quod olim obtinuit, nunc non obtinet, ut mores gentium sæpe solent mutari, nam postquam ratihabitionem usus invaluit, inter gentes tantum non omnes receptum est, ne fœdera et pacta, a legatis inita, valerent, nisi ea probaverint principes, quorum res agitur. Ipse Wicquefort, (*eodem opere*, l. i. sect. 16,) necessitatem ratihabitionum satis agnoscit hisce verbis: *Que les pouvoirs quelques amples et absolus qu'ils soient, ayant toujours quelque relation aux ordres secrets, qu'on leur donne qui peuvent être changés et altérés, et qui le sont souvent, selon les conjonctures et les révolutions des affaires.* (Bynkershoek, Q. T. Pub. lib. ii. de Rebus varii Argumenti, cap. viii.)

structions which are always special, the sovereign is bound to ratify his acts, and subjects himself to the imputation of bad faith if he refuses. But if the minister exceeds his authority, or undertakes to treat upon points not contained in his full power and instructions, the sovereign is fully justified in delaying or refusing his ratification. The peculiar circumstances of each particular case must determine whether the rule or the exception ought to be applied.<sup>1</sup>

During this period of our historial deduction was published the *Projet de Paix perpetuelle* of the Abbe Saint-Pierre, which the benevolent author, by a kind of pious fraud attributed to Henry IV, and his minister Sully, with the view of recommending it to the adoption of the sovereigns and ministers, to whom the authority of these great names would be more imposing than the intrinsic merits of the scheme itself. He had been present at the conferences of Utrecht, and having witnessed the difficulties attending the settlement of the terms of peace drew up the projet of a treaty for rendering it perpetual.<sup>2</sup> He afterwards pub-

§ 17. *Projet de Paix perpetuelle de l'Abbé de Saint-Pierre.*

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<sup>1</sup> Non tamen negaverim, si legatus publicum mandatum, quod forte speciale est, vel arcanum, quod semper est speciale, examussum sequutus, fœdera et pacta inest, justî principis esse, ea probare, et nisi probaverit, male fidei reum esse, simulque, legatum exponere ludibrio; sin autem mandatum exceßerit, vel fœderibus et pactis nova quædam sint inserta, de quibus nihil mandatum erat, optimo jure poterit princeps vel differe ratihabitionem, vel plane negare. Secundum hæc damnaverim vel probaverim negatas ratihabitiones, de quibus proluxe agit Wicquefort d. l. ii. sect. 15. In singulis causis, quas ipse ibi recenset, ego nolim judex sedere, nam plurimum facti habent, quod me latet, et forte ipsum latuit. Non immerito autem nunc gentibus placuit ratihabitio, cum mandata publica, ut modo dicebam, vix unquam sint specialia, et arcana legatus in scriniis suis servare soleat, neque adeo de his quicquam rescire possint, quibuscum actum est. (Q. J. Pub. lib. ii. De Rebus varii Argumenti, cap. vii.)

<sup>2</sup> *Projet de Traité pour rendre la paix perpetuelle entre les souverains chrétiens, pour maintenir toujours le commerce entre les nations et pour affermir beaucoup davantage les maisons souveraines sur le trône, proposé autrefois par Henri le Grand Roi de France, agréé par la Reine Elisabeth, par Jacques I, et par la plupart des autres potentats de l'Europe.* (Utrecht, 1713, 3 tomes 12mo.)

lished in 1729 the *Abregé du Projet de Paix perpetuelle* in three volumes, which contains a complete development of his plan, based upon the state of possession as fixed by the treaties of Utrecht, and seeking to make it perpetual by preserving the equilibrium of forces among the various European powers, and adjusting their controversies by pacific means. For this purpose the *first* article of the projet proposed to establish a perpetual alliance between the members of the European league, or christian republic, for their mutual security against both foreign and civil war, and for the mutual guarantee of their respective possessions and of the treaties of peace concluded at Utrecht.

The 2d article proposed that each ally should contribute to the common expenses of the grand alliance a monthly contribution to be regulated by the general assembly of their plenipotentiaries.

The 3d article provided that the allies should renounce the right of making war against each other, and accept the mediation and arbitration of the general assembly of the league for the termination of their mutual differences, three-fourths of the votes being necessary for a definitive judgment.

The principal sovereigns and states who were to compose the league were arranged in the following order :

1. The King of France.
2. The Emperor of Germany.
3. The King of Spain.
4. The Emperor or Empress of Russia.
5. The King of Great Britain, Elector of Hanover.
6. The Republic of Holland.
7. The King of Denmark.
8. The King of Sweden.
9. The King of Poland, Elector of Saxony.
10. The King of Portugal.
11. The Sovereign of Rome.
12. The King of Prussia, Elector of Brandenburg.
13. The Elector of Bavaria and his co-states.

14. The Elector of Palatine and his co-states.
15. The Swiss and their co-States.
16. The Ecclesiastical Electors and their co-states.
17. The Republic of Venice and its co-states.
18. The King of Naples.
19. The King of Sardinia.

Each of these nineteen powers was to have a single vote in the European diet, and the smaller republics and princes to be associated in the league, with the right of giving a single collective vote as in the assembly of the present Germanic confederation. "Comme le Grand Duc de Toscane peut faire présentement une voix de plus, il sera facile de le nommer comme la vingtième puissance, mais *toutes ces petites difficultés* peuvent facilement se régler par provision à la pluralité de voix."<sup>n</sup>

The 4th article stipulated that if any one of the allied powers should refuse to carry into effect the judgments and regulations of the grand alliance, or negotiate treaties in contravention thereof, or prepare to wage war, the alliance should arm and act offensively against the offending power until it was reduced to obedience.

The 5th article declared that the general assembly of plenipotentiaries of the alliance should have power to enact by a plurality of votes, all laws necessary and proper to carry into effect the objects of the alliance; but no alteration in the fundamental articles to be made without the unanimous consent of the allies.

The almost verbal coincidence of these articles with those of the fundamental act of the Germanic confederation established by the congress of Vienna in 1815 is remarkable. Fleury, to whom Saint-Pierre communicated his plan, replied to him: "Vous avez oublié un article essentiel, celui d'envoyer des missionnaires pour toucher les

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<sup>n</sup> Abregé du Projet de Paix perpétuelle, tom. i. p. 349, édit. de Rotterdam, 1736.

cœurs des princes et leur persuader d'entrer dans vos vues." But Dubois bestowed upon him the highest praise, expressed in the most felicitous manner, when he termed his ideas : "les rêves d'un homme de bien." And Rousseau published in 1761 a little work to which he modestly gave the title of *Extrait du Projet de Paix perpétuelle de M. l'Abbé de Saint-Pierre*, but which is stamped with the marks of Rousseau's peculiar original genius as a system-builder and reasoner upon the problem of social science.\*

He sets out with stating that even a very superficial view of political societies, as now constituted, will be sufficient to convince us that the greater part of their imperfections proceed from the necessity of devoting those cares and those means to the external security of each state which ought to be devoted to its internal improvement. If social institutions had been the work of reason, and not of passion and prejudice, mankind would not have so long failed to perceive that their existing organization creates a social relation between the citizens of the same state, whilst it leaves them in a state of nature towards all the rest of the human race. Civil wars have only been prevented by rendering foreign wars inevitable, thus making each particular society the perpetual enemy of every other.

\* The editor of this tract M. de Bastide says : " Par la simplicité du titre il paroltra d'abord à bien des gens que M. Rousseau n'a ici que le mérite d'avoir fait un bon *extrait*. Qu'on ne s'y trompe point, l'analiste est ici créateur à bien des égards. J'ai senti qu'une partie du public pourroit s'y tromper, j'ai désiré une autre intitulation. M. Rousseau plein d'un respect scrupuleux pour la vérité et pour la mémoire d'un des plus vertueux citoyens qui aient jamais existé, m'a répondu :

\* \* \* " A l'égard du titre, je ne peux consentir qu'il soit changé contre un autre qui m'approprieroit davantage un projet qui ne m'appartient point. Il est vrai que j'ai vu l'objet sous un autre point de vue que l'Abbé de Saint-Pierre, et que j'ai quelque fois d'autres raisons que les siennes. Rien n'empêche que vous ne puissiez, si vous voulez, en dire un mot dans l'avertissement, pourvu que le principal honneur demeure toujours à cet homme respectable."

If there be any practicable means of avoiding these evils they must be sought for in the establishment of confederations, by which distinct communities may be united together, in the same manner as the individual members of a particular state are now united in one society. The ancients were familiar with this form of government combining the internal freedom and order of small communities with the external security of powerful states. But none of the ancient confederations could be compared in wisdom with that of the Germanic empire, the Helvetic league, and the States General of Holland. The defects still adhering to these institutions only proved that political as well as moral science was still in a very imperfect state.

Besides these particular leagues of positive institution, the nations of Europe form among themselves a tacit union which has been gradually produced by the community of manners, religion, arts, letters, commerce, and international law. The nations composing this great European society have inherited from that of ancient Rome, some, their codes of jurisprudence, and all, their religious faith and forms of worship, binding together the states professing Christianity, and excluding from its pale the races adhering to the religious institutions of Mohammed. But this humanizing influence of a mild and benevolent religion, of improving arts and sciences, of constant intercourse with the mutual exchange of benefits, is powerfully contrasted with the cruel and savage wars waged by the nations of Christendom against each other, their mutual distrust, their blind intolerance, and the want of efficient guarantees for the observance of their mutual engagements, converting each treaty into a mere temporary suspension of hostilities. The European public law, founded on no fixed principles, has incessantly varied, and accommodated itself to the will of the most powerful; so that constantly recurring wars have become inevitable, and the general sense of insecurity has compelled even the most pacific states to maintain permanent military establishments disproportioned to their re-

sources, and oppressive to their people. It would be a fatal error to suppose that these evils can ever be remedied by the mere natural force of things, without calling in the aid of political science. The system of Europe has precisely that degree of solidity which keeps it in a state of perpetual agitation, without overthrowing it; and if the ills we endure cannot well be augmented by any conceivable change, still less can they be terminated by a violent revolution. The existing equilibrium of forces among the various members of the European society, is the work of nature rather than of art. It maintains itself without adventitious aid, so that even if it should give way in one part, it would soon reestablish itself in another. If the princes accused of aiming at universal monarchy, have really aimed at it, they have manifested more ambition than genius; a single moment's reflection being sufficient to show the vanity of such projects. Such is now the equality of discipline, the equilibrium of forces, and the rapid communication of intelligence among all civilized nations, that it is obviously impossible for any one potentate, or a confederacy of potentates to subjugate all Europe; or to hold it in subjugation, supposing it to be once subdued: not that the natural boundaries of the Alps, the Rhine, the sea, and the Pyrénées, form obstacles insurmountable by human efforts, but that these obstacles are fortified by moral means operating as checks against the spirit of aggression and conquest. The European system is maintained by that perpetual vigilance which marks each disturbance of the balancing forces; and above all, by the institution of the Germanic body, which placed in the centre of the system, serves as a counterpoise to the other great powers, formidable by the extent of its territories and its warlike population, and at the same time from the very nature of its constitution, acting on the defensive only, restraining others, whilst it lacks both the disposition and the means of aggrandisement at the expense of its neighbours. Notwithstanding the defects of this constitution of the empire, it is cer-

tain that while it subsists, the equilibrium of Europe cannot be entirely overthrown; one of its states cannot be subjugated by another; and the treaty of Westphalia will perhaps for ever remain the basis of our political system. Thus the science of public law, studied with such diligence by the Germans, is still more important even than they suppose. It is not only the public law of Germany, but in some respects that of all Europe.

But if the present political system of Europe cannot be shaken by the preponderance of any one power, it must be admitted that it is only maintained in this position by an action and reaction, which keeps its different parts in a perpetual agitation unfavourable to the development of the internal prosperity of each particular state. In order to substitute for this imperfect association a solid and durable confederacy, all its members must be placed in such a state of mutual dependence, that no one shall be able to resist all the others united, or to form separate alliances capable of resisting the general league. For this purpose it is indispensable that the confederacy should embrace all the European powers; that it should have a supreme legislature, capable of establishing general regulations for its government, and a judicial tribunal adequate to give effect to these regulations; that it should possess a coercive power capable both of restraining and compelling the action of its members; and sufficient authority to prevent any of them from withdrawing from the union whenever caprice or interest may dictate. Nor would the establishment of such a confederacy be attended with insurmountable difficulties. It is only necessary that statesmen should renounce the puerile prejudices of their craft; that sovereigns should abandon the uncertain objects of vulgar ambition for the certain security which would be afforded to themselves, their dynasties, and their people by the proposed innovation; and that nations should relinquish those absurd prejudices, which have hitherto induced them to consider the difference of language, race, and religion as constituting in-



surmountable obstacles to a more perfect union among the members of the great European family. In order to be convinced of the possibility of rendering such a confederacy both efficient and durable, it is only necessary to take into consideration the example of the Germanic body, composed of so many different states of such unequal forces, and which has so long maintained the public peace among its members, imperfectly and with some exceptions to be sure, but still sufficient to justify the application of the same principle on a still larger scale. If the ambition of princes is now restrained to some extent by the fear of provoking the general hostility of Europe by attacking one of its members, still more effectually would such aggressions be restrained by the certainty of being encountered by the law of the European diet possessing adequate powers of execution. Without appealing to those higher motives, for addressing which to sovereigns Saint Pierre had most unjustly incurred the ridicule of practical statesmen, such as the love of true glory, of humanity, and a regard to the dictates of conscience and the precepts of religion. Rousseau merely supposes princes to be endowed with common sense, and capable of estimating how much their interests would be promoted by submitting their respective pretensions to the arbitration of an impartial tribunal, rather than resorting to the uncertain issue of arms, which even to the victor seldom brings with it adequate compensation for the blood and treasure expended in the contest.

# HISTORY

## OF THE

### MODERN LAW OF NATIONS.

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#### PART THIRD.

HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA, FROM THE PEACE OF PARIS AND HUBERTSBURG, 1763, TO THE FRENCH REVOLUTION, 1789.

WE are now arrived in the course of our historical deduction at that period which was stained by the first partition of Poland, the most flagrant violation of natural justice and international law which has occurred since Europe first emerged from barbarism. The perpetration of this great political crime was facilitated by the obstinate adherence of the Poles to the radical defects of their national constitution, by their blind intolerance and factious dissensions. The absurd institution of the *liberum veto*, which legalized anarchy, could only be checked by the right of confederation, which legalized rebellion. These faults rendered them an easy prey to the powerful military monarchies by which they were surrounded, but are far from excusing this original act of violence which has been consummated in our own times by the total extinction of Polish independence. John Casimir, the last king of Poland of the house of Wasa, predicted the consequences of the internal dissensions by which the nation was distracted in his time. In a

§ 1. First  
Partition of  
Poland, 1772.

speech addressed to the Polish diet in 1661, he said : " In the midst of our intestine divisions we have to fear the invasion and dismemberment of the republic. The Muscovites, (God grant that I may prove a false prophet !) will subdue the people who speak their language ; the grand duchy of Lithuania, Great Poland, and Prussia, will fall into the hands of the house of Brandenburg ; and Austria will not forget herself in the general devastation : her share will be Cracow and the surrounding territory."<sup>a</sup>

The time was come when these prophetic words were to be fulfilled. Stanislaus Poniatowsky had been raised to the throne of Poland in 1764 by the influence of Catharine II, of Russia. The non-catholic subjects of the republic, both Greeks and Protestants, claimed her powerful protection against the oppression of the dominant sect. Frederick II, of Prussia, who was then left without a single ally against his inveterate enemy the house of Austria, formed a secret convention with the Empress by which he engaged to sustain her measures in favour of the confederation, which the dissidents had formed against the national diet. A Russian army occupied Poland, and a treaty of alliance was concluded in 1768, between the Empress and the republic, by which the anarchial constitution of the *liberum veto* was guaranteed and the toleration of the dissidents secured. The anarchy of Poland was thus perpetuated under Russian protection seconded by the selfish and short sighted policy of Prussia. The discontented party formed the confederation of Bar under the patronage of France, and took up arms to expel the foreign intruders.

In this state of things the Austrian troops crossed the southern border of Poland in 1770 under pretext of setting up monuments to mark the boundaries of Hungary. They occupied the rich salt mines of Bochnia and Wieliczka the principal sources of the revenues of the Polish kings.

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<sup>a</sup> Lanigii, Orat. Procerum Europæ, Lips. 1713, P. ii. p. 243.

Frederick II, availed himself of the pretext of a contagious disease which desolated the country to enter Great Poland with a sanatory cordon. Stanislaus Poniatowsky appealed in 1771, to his protectress Catharine II, against these aggressions. She was then engaged in war with the Turks, which though successful, exhausted her resources, and which she was desirous of speedily terminating on advantageous terms. Prince Kaunitz, the Austrian minister, had already made a secret convention with the Porte, by which Austria stipulated to compel Russia to make peace on the basis of the *status quo*. Austria sought to engage Frederick II, to remain neutral in case war between the two empires should be the consequence of the Empress persisting in her designs upon Turkey. Frederick declared in favour of Russia, but sent his brother Prince Henry to the court of Catharine to endeavour to persuade her to consent to moderate conditions of peace with the Porte. The Empress communicated to Prince Henry the intelligence she had just received of the Austrian invasion of the Polish frontier; adding, "that Poland seemed to be a country where it was only necessary to stoop in order to pick up what one would. If Austria chose to take a piece of that country, the other neighboring states had as good a right to do the same." Upon this hint Prince Henry spake, and developed a plan for the partition of Poland, by which Catharine might aggrandize Russia without exciting the jealousy of Austria, which power could not look with the same indifference on the dismemberment of Turkey; whilst the king of Prussia might receive in such an arrangement a compensation for the sacrifices he had made to the Russian alliance.

Kaunitz, who wished to avoid the odium of being considered the author of the partition project, and to quiet the scruples of conscience felt, or affected, by Maria Theresa, endeavored to get Russia to make the first proposition. For this purpose he declared to Prince Gallitzin the Russian minister at Vienna, in October, 1771, that the Austrian

court would not consent to mediate for peace between Russia and the Porte upon the terms which had been proposed by the former and were finally stipulated at Kainaraji in 1774, unless Russia would give the most positive assurances that she had no intention to dismember Poland, either for her own benefit or that of others ; " it being however, well understood that Austria intended to reclaim thirteen towns in the county of Zips, formerly belonging to Hungary, and mortgaged to the republic." Kaunitz enlarged upon the interminable difficulties to which any attempt at a partition of Poland would lead, and left Gallitzin firmly convinced that Austria was impatient to concur in the views of Russia and Prussia. The Russian minister was accordingly instructed to answer that both these powers had also territorial claims upon Poland, which might be adjusted in concert with Austria, so as to preserve that equality which was necessary to maintain the balance of power between the three monarchies. The Austrian minister met this overture by observing that any inequality in the respective shares of the partitioning powers might be corrected by taking a portion of territory from another neighbour who had something to spare. On Gallitzin remarking that this could be no other than the Turkish empire, Kaunitz replied it was that he meant ;—at the same time recommending the greatest despatch, secrecy, and mutual confidence. This, he said, was above all necessary in order to prevent the interference of France and England.

In the meantime the British cabinet had procured and communicated to the Empress Catharine a copy of the secret convention concluded in July, 1771, between Austria and the Porte, which naturally had the effect of shaking the confidence of the Russian court in Kaunitz. The two cabinets of Petersburg and Berlin therefore continued to negotiate directly between themselves the terms of the proposed partition. Exorbitant as were the pretensions of Russia, she still decidedly opposed the acquisition of Dant-

zic and Thorn by Prussia. Frederick II finally desisted from this pretension, being doubtless convinced that once master of the mouths of the Vistula he would easily compel these towns to submit to his dominion. A convention between the two courts was consequently concluded at St. Petersburg on the 17th February, 1772, in which their respective acquisitions were ascertained, and it was stipulated that Austria should be invited to join in the proposed partition. That power accordingly acceded on the 19th of the same month, but demanded for her share nearly one-third of the whole territory of Poland. She was at last induced to desist from a part of her pretensions, and a triple convention was signed at St. Petersburg on the 5th August 1772, by which all that part of Lithuania north of the Dwina and east of the Nieper was secured to Russia; Galicia and Lodomeria to Austria; and Polish Prussia, (except Dantzick and Thorn) with Great Poland to the river Netze to Prussia.

The three partitioning powers immediately took possession of these territories, and published each a separate manifesto setting forth the pretended claims upon which they professed to justify this act of violence. The application in this case of the right of intervention growing out of the supposed danger to neighboring states from the internal transactions of a particular country was attempted to be justified by the interfering powers, upon the ground, that the disordered state of Poland forced them to incur expense in securing the tranquility of their own frontiers, and exposed them to the uncertain, but possible consequence of the dissolution of the republic, and to the danger of seeing their own mutual harmony and friendship destroyed. In consequence whereof their majesties were "determined to take immediate and effectual possession of such parts of the republic as may serve to fix more natural and sure boundaries between her and the three powers."

In the answer to these manifestoes published by the Polish government, reference was made to the long series of

treaties, by which the integrity of the territory possessed by Poland for several centuries had been guaranteed by the very powers who now sought to despoil her. The answer also stated, that if the transactions of those remote times were to be resorted to, when possessions were lost and won with so much facility, by the sword of the conqueror, Poland herself might claim a just title to vast provinces now held by the partitioning powers, the right to which was only secured by that sacred and salutary principle of prescription which secured the lawful possessions of every civilized nation.

The consent of the national diet assembled at Warsaw in 1773, to the treaties of partition was extorted by the presence of foreign force. The nuncios of Podolia and Volhynia protested against all that might be done in order to sanction them; but a commission named by the senate and the equestrian order finally consented to sign the treaties of 1775, by which the partition was confirmed, the existing vicious constitution of the republic guaranteed by the partitioning powers so as not to be subject to alteration without their consent, and a pretext thus furnished for their perpetual interference in the internal affairs of Poland.<sup>b</sup>

From this period Catharine II continued to treat Poland as a province of the Russian empire. The renewal of the war between Russia and Turkey in 1787 seemed to afford the Polish nation a favorable opportunity to shake off the galling yoke they had so long worn with impatience. Austria was involved in that Turkish war as the ally of Russia. The close connection between Russia and Prussia was dissolved by the death of Frederick II. His successor

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<sup>b</sup> Schoel, *Histoire abrégée des Traités de Paix*, tom. xiv. pp. 5-79. *Mémoires et Actes authentiques relatifs aux Négotiations qui ont précédées le Partage de la Pologne tirés du Portefeuille d'un ancien ministre du XVIII<sup>e</sup> siècle* (le Comte de Goertz) 1810—pp. 85, 159, 175, 179, 181. *Denkwürdigkeiten meiner Zeit, oder Beiträge zur Geschichte vom letzten Viertel des achtzehnten und vom Anfang des neunzehnten Jahrhunderts*, 1778, 1806, von C. W. von Dohm, 1814-1819, 1. Band, App'x, §§ 433-514.

adopted an opposite line of policy under the advice of Hertzberg, who sought to make the triple alliance of Great Britain, Prussia and Holland, instrumental in making Poland independent of Russia. Frederick William II offered the republic his alliance with a guarantee of the integrity of its remaining territory. The diet of 1788 decreed an augmentation of the national army to the number of 100,000 men. The Russian minister protested against this decree, as a breach of the constitution of 1775, guaranteed by the three partitioning powers, by which the army was limited to 30,000. The Prussian minister presented to the Diet a declaration, on the part of his government, stating that this guarantee ought not be construed to prevent the republic from reforming its internal government. In 1780, the king of Prussia reiterated the offer of his alliance with the republic, upon condition that the Polish army should be augmented to 60,000 men, and a new constitution established. Catharine II protested against any alteration in the constitution which she had guaranteed; but she was too much occupied with the Turkish war to prevent the conclusion of the alliance with Prussia which was signed on the 29th March, 1790. This treaty stipulated that "if any foreign power, by virtue of preceding acts and stipulations, or of their interpretation, should assume the right of interfering in the internal affairs of the republic of Poland, or its dependencies at any time, or in any manner whatsoever, the King of Prussia will employ, in the first instance, his good offices to prevent the occurrence of hostilities growing out of such a pretension, and in case these good offices should fail, and hostilities should result against Poland, the King of Prussia, recognizing this as the *casus fœderis*, will assist the republic according to the tenor of the 4th article of the present treaty."<sup>c</sup>

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<sup>c</sup> Martens, Recueil des Traités tom. iv. p. 472. Von Raumer, Polens Untergang, Historisches Taschenbuch, tom. iii. pp. 467-474.



The conclusion of this alliance was followed by the establishment, on the 3d of May, 1791, of a new constitution abolishing the *liberum veto* and rendering the Polish crown hereditary in the Electoral House of Saxony. These measures were warmly approved by Frederick William II.<sup>d</sup>

It was of this revolution that Burke said : " The state of Poland was such, that there could scarcely exist two opinions but that a reformation of its constitution, even at some expense of blood, might be seen without much disapprobation. No confusion could be feared in such an enterprize ; because the establishment to be reformed was itself a state of confusion. A king without authority ; nobles without union or subordination ; a people without arts, industry, commerce, or liberty ; no order within, no defence without ; no effective public force but a foreign force, which entered a naked country at will, and disposed of every thing at pleasure. There was a state of things which seemed to invite, and might perhaps justify bold enterprize and desperate experiment. But in what manner was this chaos brought into order ? The means were as striking to the imagination as satisfactory to the reason, and soothing to the moral sentiments. In contemplating that change, humanity has every thing to rejoice and to glory in ; nothing to be ashamed of, nothing to suffer. So far as it has gone, it probably is the most pure and defecated public good which ever has been conferred on mankind. We have seen anarchy and servitude at once removed ; a throne strengthened for the protection of the people, without trenching on their liberties, and all foreign cabal banished, by changing the crown from elective to hereditary. Ten millions of men in a way of being freed gradually, and therefore safely to themselves and the state, not from civil or political chains, which, bad as they are, only fetter the

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<sup>d</sup> Lettre du Roi de Prusse au Comte de Goltz. Segur, Histoire de F. Guillaume II, tom. III. p. 252. Pièces Justificatives.

mind ; but from substantial personal bondage. Inhabitants of cities, before without privileges, placed in the consideration which belongs to that improved and connecting situation of social life. One of the most proud, numerous, and fierce bodies of nobility and gentry ever known in the world, arranged only in the foremost rank of free and generous citizens. Not one man incurred loss or suffered degradation. All, from the king to the day labourer, were improved in their condition. Every thing was kept in its place and order ; but in that place and order every thing was bettered. To add to this happy wonder (this unheard of conjunction of wisdom and fortune,) not one drop of blood was spilled ; no treachery ; no outrage ; no system of slander more cruel than the sword ; no studied insults on religion, morals or manners ; no spoil ; no confiscation ; no citizen beggared ; none imprisoned ; none exiled : the whole was effected with a policy, a discretion, an unanimity and secrecy, such as have never been before known on any occasion, but such wonderful conduct was reserved for this glorious conspiracy in favour of the true and genuine rights of man.\*

The party among the Polish magnates, opposed to the new constitution, formed, in 1792, a confederation at Targowice ; and the empress of Russia, delivered from the Turkish war by the peace of Jassy, declared her resolution to support their resistance. The national diet prepared to sustain their own work, and for this purpose claimed the assistance of Prussia under the alliance of 1790. But another change had come over the fickle policy of the Prussian cabinet. Frederick William II had become reconciled with Russia and Austria. His views were now turned towards concerting with them the means of suppressing the French revolution ; and he answered that the establishment

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\* Burke's Appeal from the New to the Old Whigs. Works, vol. vi. p. 243, ed. 1815.

of the constitution of the 3d May, 1791, being posterior to the treaty of alliance, the *casus fœderis* had not arisen, especially as he had never approved this change, but on the contrary had foreseen its unfortunate results.<sup>f</sup> Poland, thus abandoned by the only ally, on whose aid she might rely, could not long continue an unequal resistance against the overwhelming power of Russia. This resistance became still more hopeless when her frontiers were invaded by the troops of that very ally.

§ 2. Second  
Partition of  
Poland, 1793.

The consequence was the second partition of Poland between Russia and Prussia, which took place in 1793, and was confirmed in the diet of Grodno under the influence of the terror inspired by the presence of Russian cannon and Russian bayonets.

§ 3. Third  
Partition,  
1795.

The insurrection of 1794 under Kosciusko was followed by the third and last partition between Austria, Prussia, and Russia, embracing the remaining territories of Poland, and bringing in contact the frontiers of the three great military monarchies, by whom her destruction had been worked, in conjunction with her own factious and venal sons.<sup>g</sup>

A celebrated political writer has condemned this iniquitous spoliation, not merely as a departure from those rules of justice, by which the European community had been previously governed, and by the observance of which the independence even of the smallest states had been secured from the encroachments of the most powerful monarchies, but as a misapplication of the principles of the balancing system itself, by means of which that security had been so long enjoyed. This writer compares the political balance of power among nations to that system of checks and balances among the different orders of the same states, by

<sup>f</sup> Lettre du Roi de Prusse au Roi de Pologne, Segur, tom. iii. p. 259. *Pieces Justificatives*.

<sup>g</sup> Segur, tom. iii. pp. 132-175. Schoell, tom. xiv. pp. 112-169. Raumer, *Polens Untergang*, *Historisches Taschenbuch*, tom. iii. pp. 474-537.

which its constitution is preserved in healthy action under ordinary circumstances, but which becomes the source of fatal disorders when the different bodies of the state instead of uniting to promote the public good, combine in measures injurious to the common weal. In the same manner it may happen in the great society of nations that those forces which ought to be combined to protect the weak against the powerful, are united for the oppression of those whose security consists in the common interest which all have in preventing the aggrandizement of any one state at the expense of another. The first partition of Poland was attempted to be reconciled with the general principle of the balancing system, by dividing the territory taken from the republic among the several parties in such proportions as would leave their relative forces the same as before. By this sophism the partitioning powers sought to palliate the evil consequences of an example which contributed more than any thing which had occurred in the intercourse of nations, to shake the public confidence in that system, hitherto found efficacious in preventing such flagrant acts of injustice.

“What rendered,” says Von Genz, “the partition of Poland so much more injurious to the great interest of Europe than many other recent acts of violence, still more iniquitous in their conception and execution, was the fact that the injury arose from that very quarter whence the great society of nations had been taught to look for safety and protection. Separate leagues between several states had been hitherto commonly resorted to, as a protecting barrier against the power and ambition of a single oppressor; the world now saw with consternation, the possibility of such confederacies being formed to perpetrate those very acts of spoliation which had been hitherto prevented by similar means. The impression made by this unexpected discovery was the more painful, as the inventors of this evil project, in the whole course of their enterprize invoked the principles of the balancing system as their

guide and polar star, and actually followed them, so far as circumstances would permit, in their division of the spoil, and whilst they inflicted the most fatal wounds upon the spirit and very existence of this system borrowed its external forms, and even its technical language. *Corruptio optimi pessima*: To behold this noble system, which the wisdom of the European community had devised for its security and welfare, thus perverted, was an odious spectacle; but the evil character of the deed was more fully brought to light by its disastrous consequences. The cause of public justice was every where betrayed and deserted. A rabble of loquacious sophists, who at this time began to shake the foundations of social order in France, when the mighty of the earth, not inflamed with a tumult of passion, but with deliberate strides and systematic purpose, had broken into the sanctuary of public law, made this unhappy incident the pretext for indecent mockery of the most sacred political maxims. Even the enlightened and virtuous part of mankind became infected with the contagion of doubt; unmindful that the purest fountains may become corrupted, that the most healing waters may be poisoned; unmindful that the most sensible blow which the federative system of Europe could receive, should only summon us in a more pressing manner to strengthen the foundations of the edifice, and to devise better contrived precautions to prevent a repetition of similar evils; they abandoned themselves to a comfortless distrust in the efficacy of political maxims, or to systematic indifference. How much this pernicious disposition of mind must have contributed to facilitate the practice of iniquity, and the spread of desolation, when at last came the evil days, in which all right was trampled under foot, and all order fell into ruin, cannot have escaped the notice of any attentive observer.

“Whilst the partition of Poland was the first occurrence, which by a misapplication of the forms of the balancing system, introduced extensive disorder into the affairs of Europe, so also it was one of the first by which the relax-

ation of public spirit and of a lively interest in the common welfare of states disclosed itself distinctly to view. The silence of France and England, the silence of all Europe, whilst such an alarming measure was contrived and carried into effect, is still more astonishing than the measure itself. The imbecility of the French cabinet, at the period when the evening shades began to gather round the life of Louis XV, explains, but does not justify this silence. From England alone, and still less from the other powers, could any effectual opposition be expected whilst France was dumb; but that no public demonstration, no energetic remonstrance, no earnest protestation, no audible disapprobation should have followed—these manifest symptoms of general relaxation and decay of strength will not surely escape the observation of the future historian.”<sup>a</sup>

The central states of continental Europe continued to enjoy the blessings of peace under the treaties concluded at Hubertsburg in 1763, with the single exception of the short and almost bloodless war of the Bavarian succession, 1778. This incident was terminated in 1779 by the peace of Teschen, under the mediation and guarantee of France and Russia. As this treaty renewed and confirmed the treaties of Westphalia, it became the pretext for the future interference of Russia in the internal affairs of Germany; although the German public jurists have contested the right on the ground that the empire had not yet acceded to the treaty of Teschen at the time when the guarantee of the Empress Catherine II was given, and had not required her mediation and guarantee. The designs of the Emperor Joseph II, upon Bavaria having been renewed in 1785, by the proposed exchange of Belgium for the Electorate, Frederick II formed a league, under the name of the *Fürstenbund*, to which the electors of Saxony, Menz, Hesse, and

§ 4. Question  
of the Bavari-  
an Succession,  
1778.

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<sup>a</sup> Genz, Fragmente aus der neuesten Geschichte des politischen Gleichgenichts in Europa, Schriften, Band iv. §§ 51–59.

Hanover acceded, together with a number of other German states, for the guarantee of the constitution of the empire. This league might have worked a complete revolution in the internal affairs of Germany, had it not been cast into the shade by the mightier events of the French revolution.<sup>i</sup>

§ 5. Question of the free navigation of the Scheldt, 1781.

The Emperor Joseph II, defeated in his designs on the Bavarian succession, turned his restless activity in another direction. The treaty of Westphalia, 1648, by which the independence of the United Provinces was acknowledged by Spain, contained a stipulation, according to which the mouth of the river Scheldt, the great outlet for the commerce of the Catholic provinces still remaining under the Spanish dominion, was to continue forever shut on the side of the United Provinces proprietors of both banks towards the sea. It was also stipulated by the same treaty that the Spaniards should continue to enjoy their navigation to the Indian seas in its existing state, *without the faculty of extending it*, and that the inhabitants of the United Provinces should abstain from frequenting the places occupied by Spain in the East Indies. When the Catholic provinces of the Netherlands were transferred to the German branch of the house of Austria, by the treaty of Utrecht, 1713, they were at the same time subjected to a military servitude intended for the protection of the United Provinces from the danger of invasion on the side of France. By the final Barrier treaty signed at Antwerp on the 15th November, 1715, between Austria, Great Britain, and Holland, it was stipulated that Namur, Tournay, Menin, Furnes, Ypres, and certain other towns of the barrier should be fortified and garrisoned by the Dutch.

Joseph II declared, in 1781, that the barrier was no longer necessary for the security of Holland since the alliance between Austria and France, and in order to get rid

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<sup>i</sup> Schoell, *Histoire abrégée des Traités de Paix*, ch. 19, §§ 1, 2.

of the commercial servitudes thus imposed upon Belgium in favour of Holland, in respect to the East India trade and the navigation of the Scheldt, which were almost fatal to the prosperity of the Austrian provinces, he brought forward in 1784, several antiquated claims against the republic. These claims being repelled by the States General, the Emperor declared that he would relinquish them all, if they would consent to open the navigation of the Scheldt to his subjects, and permit them to carry on the direct trade between the East Indies and the port of Ostend. The Dutch applied for the interference of Great Britain and France. The British government declined its mediation, but that of France was offered, and accepted by the Emperor. In the declaration drawn up by the Count de Vergennes on this occasion, it was stated, that the Dutch, in resisting the Emperor's demand for opening the Scheldt, did but maintain a right, which they had enjoyed without interruption for a century and a half, which was secured to them by a solemn treaty, and which they considered as the foundation of their prosperity, and even essential to their very existence.

A compromise was at last effected by the treaty of Fontainebleau, November 8th, 1785, under the mediation and guarantee of France, by which the stipulations of the treaty of Westphalia, 1648, were confirmed; the barrier treaties annulled; and it was agreed that the river Scheldt, from Saftingen to the sea, (of which the exclusive sovereignty should continue to belong to the States General,) should continue to be shut on their side, as well as the canals of Sas, of Swin, and the other mouths of the sea there terminating, conformably to the treaty of Munster. In return for these concessions, the Dutch accorded several of the Emperor's demands, and agreed to pay an indemnity of ten millions of florins.

This arrangement was immediately followed by a treaty



of alliance between France and Holland, concluded at Fontainebleau on the 10th November, 1785.<sup>1</sup>

§ 6. Intervention of Prussia in the internal affairs of Holland, 1788.

This alliance was the work of the Dutch 'patriotic or anti-Orange party. The office of stadtholder had been re-established in 1747, in favour of William IV, of the younger branch of the house of Orange. The victorious

<sup>1</sup> Schoell, *Histoire abrégée des Traités de Paix*, tom. iv. pp. 59-89. Flaman, *Histoire de la Diplomatie Française*, tom. vii. pp. 399-410. Martens, *Causés célèbres du Droit des Gens*, tom. ii. p. 203.

In the question of the free navigation of the Scheldt, the cause of the Emperor was maintained by Linguet, (*Annales Politiques*, Nos. 88 and 89,) whilst that of Holland was defended by Mirabeau in his *Doutes sur la liberté de l'Escaut*. In this work he puts the claim of Holland upon the ground of positive conventional law. "La souveraineté de ce fleuve lui a été garantie par toutes les conventions qui assurent l'existence politique de l'Europe. C'est à cette condition que les Hollandais renoncèrent aux Pays-Bas-Antriechiens. Ils ont cent trente-cinq ans de possession. La France et l'Angleterre leur ont garanti les avantages de cette navigation, exclusivement et sans concurrence. Si pour renverser des traités positifs, on veut aujourd'hui se prevaloir du droit naturel, pourquoi toutes les puissances de l'Europe ne se reprendraient-elles pas mutuellement les provinces conquises, cédées, hérédées? L'ordre social, dit Rousseau, est un droit sacré qui sert de base à tous les autres. Cependant ce droit ne vient point de la nature; il est donc fondé sur des conventions. Les conventions sont donc la base de tous les droits. Faudra-t-il désormais les violer toutes, détruire tous les établissemens politiques, sapper toutes les autorités, et porter le trouble dans chaque état, sous prétexte d'y ramener les principes du droit naturel dont on s'est écarté, ou plutôt qu'on a violés partout? Comme la tranquillité des peuples est aussi un objet essentiel; comme le bonheur général dépend moins de quelque amélioration que de la jouissance paisible de ce qu'on possède; comme la république d'Henri IV, ou la diète européenne de l'Abbé de Saint-Pierre, ne sont encore établies, je soutiendrais sans remords, contre un prétendu droit naturel, que la réclamation de l'empereur est injuste, et que les autres puissances doivent l'empêcher de porter plus loin ses entreprises." We must not infer that Mirabeau was absolutely opposed to the free navigation of the Scheldt. On the contrary he endeavours to show in his fourth letter how it might be opened without danger to Holland and to Europe, viz. by the independence of Belgium constituted in the form of a federal republic, in which the United Provinces would find a pacific ally and a neutral barrier more efficient than the military barrier they had maintained with such an expense of blood and treasure. (*Ceuvres de Mirabeau*, tom. v. pp. 316, 429, ed. 1821.)

party was protected by England, whilst their antagonists leaned upon France. The councils of the republic were distracted by these contending factions, until the patriotic party finally obtained the ascendancy under William V, who had married a Prussian princess, sister of Frederick William II. The province of Holland suspended the stadtholder from his functions as captain general, in 1786, in consequence of an alleged abuse of his authority. The courts of Versailles and Berlin both attempted, in vain, to negotiate a compromise between the contending parties. The princess of Orange, who was about to proceed to the Hague, with the view of sustaining by her presence the party of the stadtholder, was stopped on her journey by the troops of Holland stationed on the frontiers of that province. Frederick William II demanded satisfaction for the insult thus offered to his sister, which was refused by the States General who relied on the support of France. A Prussian army commanded by the Duke of Brunswick entered Holland in September, 1787; the Dutch nation, distracted by party divisions, were unable to oppose any effectual resistance; and the stadtholder was restored to the plenitude of his authority by foreign force. The French cabinet had declared to the court of London, on the 16th of September, that it would not suffer the armed interference of Prussia in the internal affairs of Holland. The British government replied by announcing its determination to support the stadtholder. This menace sufficed to induce the French cabinet to discontinue its armaments, and to exchange pacific declarations with that of London. The revolution of Holland in favour of the house of Orange was thus consummated by a military intervention, justly regarded as fatal to the political consideration of France in Europe, and inconsistent with the true principles of international law; since it could not be pretended that the safety of the neighbouring states, or the general equilibrium of national forces was disturbed by the internal dissensions of the republic. They were only fatal to the power and

prosperity of Holland herself. The leaders of the patriotic party, banished from their native land, found a refuge in France; and the ascendancy of the victorious faction was maintained by treaties of alliance with Great Britain and Prussia, signed on the 15th April, 1788, guarantying the hereditary stadtholderate, with all its powers and prerogatives, in the house of Orange, as an essential part of the constitution of the United Provinces. A guarantee to a nation of its internal constitution against external attack may be a lawful, and perhaps, under some circumstances, a politic engagement, tending to preserve its national freedom and independence. But if the object of the guarantee is to prevent the nation itself from making such changes as it deems fit, it becomes a mere pretext for the perpetual interference of the guarantying power in its internal affairs, of which the first fatal example was given in the partition of Poland.

§ 7. Triple alliance between Great Britain, Prussia and Holland.

These treaties maintained the power of the house of Orange until 1795, when the exiled patriots returned with the invading army of republican France, and the stadtholder fled to England. These treaties constituted the Triple Alliance, which interfered at the congress of the Hague, 1790, in the dissensions between the Emperor and his revolted subjects of Belgium, for the purpose of restoring his authority and the ancient constitution of the Catholic provinces; compelled Denmark to withdraw the co-operation she had furnished Russia against Sweden in 1788; dictated the terms of peace between Austria and the Porte on the basis of the *status quo ante bellum* at the congress of Reichenbach in 1791; and compelled Russia to abandon her designs upon the Turkish empire at the peace of Jassy in 1792.<sup>1</sup>

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<sup>1</sup> Schoel, *Histoire des Traités de Paix*, tom. iv. pp. 90-111. Segur, *Histoire de Frederick Guillaume II*, tom. i. pp. 100-135. Flassan, *Histoire de la Diplomatie Française*, tom. vii. pp. 448-456.

1. During the internal troubles of the Dutch Netherlands, which were thus suppressed by foreign intervention, the Catholic provinces belonging to the house of Austria, were agitated by their resistance to the innovations attempted by the Emperor Joseph II. He had already introduced various reforms into the internal administration of his hereditary states of Germany and Hungary, and now sought to extend them to the Belgic provinces, by the suppression of religious processions, convents, and the university of Louvain. He issued, in 1787, an ordinance changing the whole form of government, centralizing the administration, and abolishing the ancient courts of justice. These innovations, however desirable in themselves for the improvement of the existing institutions of the country, were arbitrarily introduced in violation of the fundamental law of the *joyeuse entrée* sworn to and confirmed by the dukes of Brabant before their inauguration. The states of Brabant refused to vote the annual subsidies, in which they were joined by other provinces. The discontents of the people at last broke out in open insurrection in 1789, and a regular union of the revolted provinces was formed in 1790, styled the Republic of the United Belgic Provinces, under the government of a congress convoked at Brussels. In the midst of these events Joseph II died, and was succeeded by his brother Leopold II, who declared his willingness to re-establish the ancient constitution as the basis of his reconciliation with the Belgic people. The Belgic congress now solicited the interference of the Triple Alliance; and Count Hertzberg, the minister of Prussia at the congress of Reichenbach, transmitted to the Austrian plenipotentiaries a declaration, stating that the two maritime powers, (Great Britain and Holland,) as guarantees of the constitution of the Austrian Netherlands, and contracting parties to the treaty which secured to the house of Austria the possession of these provinces, having determined to concert measures for their pacification, the king of Prussia was resolved to co-operate with his allies in such measures

§ 8. Intervention of the Triple Alliance in the affairs of Belgium.

as should be necessary to maintain the guarantee, and the return of the provinces to their allegiance with an amnesty and the security of their ancient constitution. A congress of mediation consisting of the ministers of Great Britain, Prussia, and Holland was accordingly assembled at the Hague, who called upon the insurgent provinces to submit to their lawful sovereign. A convention was concluded by the three powers confirming to the Belgic provinces the privileges they had enjoyed under *the acts of inauguration of Charles VI and Maria Theresa*, which the Emperor ratified with the modification securing to them the privileges they had enjoyed *at the decease of Maria Theresa*. The allied courts at first declined to accede to this modification, but after tedious and protracted negotiations, Prussia and Holland consented, whilst Great Britain still refused, and the mediation thus became inoperative.<sup>m</sup>

§ 9. Mediation of the Triple Alliance in the war between Russia, Sweden, and Denmark.

2. The first war waged by the Empress Catharine II against the Turkish empire had been terminated by the treaty of Kainaraji in 1774, by which the Porte acknowledged the independence of the Tartars of the Crimea under their khan; Russia acquired the port of Asoph and certain fortresses in the Crimea; and advanced her frontier from the Nieper to the Bog, with the free navigation of the Euxine and all the Ottoman seas, including the passage of the Dardanelles. The recognition of the independence of the Crimea by the Porte prepared the way for its subjugation by Russia, which was consummated in 1783 by its annexation, together with the Kuban and the isle of Taman, to the Russian empire. This annexation was confirmed by the Porte by the treaty of 1784, and the river Kuban established as the boundary between the two empires.

The Turks again renewed the struggle with their mortal enemy in 1787; and in the following year 1788, Gus-

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<sup>m</sup> Schoell, *Histoire abrégée des Traites de Paix*, tom. iv. pp. 127-154.

tavus III, of Sweden, attempted a diversion in their favour by suddenly declaring war against Prussia. His attempt on the Russian capital failed, whilst his own frontier was attacked on the side of Norway by the Danes acting as the allies of Russia. Their co-operation was soon terminated by the interference of the Triple Alliance, and Denmark engaged to remain neutral during the rest of the war between Russia and Sweden. This was terminated in 1790 by the peace of Werela concluded on the basis of the *status quo ante bellum*.

3. In the meantime Catharine II had formed an alliance with Joseph II, the object of which was no less than the conquest and partition of the Turkish empire. Prussia negotiated a counter alliance with the Ottoman Porte; but the treaty signed by the Prussian minister at Constantinople had not yet been ratified, when the congress of Reichenbach was opened, in 1790, by the ministers of Austria, Great Britain, Holland, and Prussia. The result of the conferences was the establishment of peace between Austria and the Porte, which was finally concluded upon the basis of the *status quo* at Szistowe, in 1791, under the mediation of the Triple Alliance.

§ 10. In the war between Austria and the Porte.

4. The establishment of peace between Russia and the Porte was a work of more difficulty. Immediately after the congress of Reichenbach, Frederick William II invited the Empress Catharine to accept of the mediation of Prussia, an offer which was peremptorily refused by the Empress. The court of London also claimed for the Porte benefit of the *status quo*, and prepared a naval armament to support this pretension. The Triple Alliance demanded from the court of Denmark its good offices to engage the Empress of Russia to restore to the Turks the conquests she had made. The Empress accepted the mediation of Denmark, but declared that her honour and the safety of her Empire would allow her to consent only to a modified *status quo* as the basis of peace, and that she must except Otschakoff and its territory from the conquests to be restor-

§ 11. Between Russia and the Porte.

ed to the Porte. Count Bernstorff the Danish minister proposed as a *maxzo termine* that Russia should retain the conquered territory to the Dniester, on condition that the fortress of Otschakoff should be demolished and all the ceded territory reduced to a desert. The demolition of the fortress was refused by the Empress of Russia, and the British ministry, embarrassed by the opposition in parliament to a war with Russia, at last reluctantly consented to join the other allies in proposing to the belligerent powers the cession by Turkey of the territory between the Bog and the Dniester to Russia. The peace was concluded at Jassy in 1792 upon this condition, with a restitution of all her other conquests by Russia.

Thus the Triple Alliance continued to exercise a decisive influence upon the international affairs of Europe, until the French revolution came, and swept away in its irresistible course all existing federative systems.<sup>a</sup>

§ 12. War of  
North American  
Independence,  
1776.

The peace of Paris 1763 had left Great Britain in possession of a colonial empire in North America extending from the Arctic circle to the Gulf of Mexico. The Anglo-American colonies were peopled with a race of freemen, who resisted the first attempt at encroachment on the part of the Imperial Parliament in the shape of taxation, whilst they had hitherto submitted to its legislative power in the regulation of trade and in some cases of mere internal concern. The distinction between the exercise of these two descriptions of sovereign power would seem to be almost too subtle and evanescent for popular apprehension. But the fulness of time was come when the mother country must establish her supreme and uncontrolled dominion, or the colonies assert their complete independence. The colonies declared their independence of Great Britain on the 4th of July, 1776, as sovereign states, and formed a confederation for their mutual defence. The court of

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<sup>a</sup> Schoel, *Histoire abrégée des Traités de Paix*, tom. xiv. pp. 401-506.

France, after long hesitation and much deliberation, openly acknowledged their independence in 1778, by forming two treaties with the United States of America, the first of amity and commerce, and the second of eventual defensive alliance.<sup>o</sup>

The French court notified these treaties to that of Great Britain, and sought to justify their formation by alleging that the United States were *de facto* in possession of the independence they had declared, and that no exclusive advantage was stipulated for France in the treaty of commerce, whilst the United States reserved the full liberty of treating with any other nation on the same equal footing of reciprocity. The French government also complained of the interruption of its lawful commerce with the new republics, by British cruizers, contrary to the law of nations and existing treaties ; and alleged that Great Britain had actually commenced hostilities, by attacking a French frigate, previous to a declaration of war ; whilst the British cabinet had rejected the proffered mediation of Spain, because France had insisted that the United States should be included in the pacification.<sup>p</sup>

To this declaration the British government answered by accusing France of opening her ports to the American vessels of war and their prizes, allowing them to augment their armaments ; whilst she permitted her subjects to fit out privateers, under the American flag, to cruize against British commerce, and to carry on a contraband traffic with the revolted colonies ; and even aided them with supplies of arms and money, furnished by the French government itself, under the mask of private commercial transactions. It further alleged that even if a foreign enemy, recognized among the legitimate powers of Europe, had conquered the British American colonies, France could not recognize the ac-

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<sup>o</sup> Martens Recueil, tom. ii. pp. 587-609.

<sup>p</sup> Exposé des Motifs de la Conduite de la France, etc. Flassan, Diplomatie Française, tom. vii. p. 168.



quisitions thus made : and that treasonable revolt could not give rights greater than those of lawful war. Nor could the propositions which had been made by Great Britain for an accomodation with her revolted colonies be considered as a recognition of their independence *de facto*, such as would as would warrant the interference of a foreign power, since the very basis of the proposed reconciliation contemplated the re-establishment of the lawful authority of the mother country. It was added that no formal declaration of war on the part of Great Britain was necessary, inasmuch as hostilities had been actually commenced by France, in forming treaties of commerce and alliance with the revolted colonies, giving them aid and succour, and committing direct aggressions on British commerce.<sup>9</sup>

The court of France replied to these arguments by alleging the example of the conduct of Queen Elizabeth in recognizing the independence of the Netherlands when they revolted against Spain in the sixteenth century. After having made several secret treaties with England, the confederated provinces declared their independence in 1585, which was followed by a new treaty of alliance concluded in the same year. In order to justify this last treaty, Elizabeth published a manifesto, in which she set forth the cruelties committed by the Spanish governors in the Low Countries, and the design of the court of Madrid to deprive them of their ancient privileges. She, at the same time, declared her resolution to sustain the United Provinces in the defence of their liberties as the only means of preserving a free trade for her subjects with those provinces, and of preserving England from invasion by Spain, which would be greatly facilitated by their subjugation. It deserved to be remarked that the publication of this manifesto did not occasion any rupture between the two courts, and that in 1588 Elizabeth under-

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<sup>9</sup> *Memoire Justificatif pour servir de Réponse à l'Exposé des Motifs de la Conduite du Roi de France relativement à l'Angleterre.* (Gibbon's *Misc. Works*, vol. iv. p. 246.) This memoir was drawn up by Gibbon.

took at the request of Philip II, the office of mediatrix between that prince and the United Provinces.

The court of France further stated, that its declaration to the court of London, of the 14th March, 1778, was founded on the incontestible fact that the Americans were in the public possession of their independence when the treaties of alliance and commerce were concluded on the 6th February, 1778 ; and upon the equally incontestable principle of public law that this fact was sufficient to justify the king in forming these engagements without examining the question of the legality of that independence. It sufficed that the British government had ceased to treat the revolted colonists as rebels ; that it observed towards them the ordinary laws of war recognized between civilized nations ; that American prisoners were regularly exchanged in virtue of cartels signed by commissaries of the Congress ; that British troops had capitulated to those of the United States and their capitulations had been respected ; and that the British government had recognized the authority of the republic in sending commissioners to treat for peace with the Congress. But whether the United States had, or had not, the right of abjuring the sovereignty of England ; whether their possession of independence were legal or not : it was not for France to discuss these questions. Neither the law of nations, nor treaties, nor morality, nor policy, imposed upon the king the obligation of becoming the guardian of the fidelity of English subjects to their sovereign : it was sufficient for his majesty's justification that the colonies,—forming by their numbers and the extent of their territory a considerable nation, had established their independence, not merely by a solemn declaration, but also in fact, and had maintained it against all the efforts of their mother country. Such was the position of the United States when the king began to negotiate with them : his majesty was free to consider them as an independent nation, or as subjects of Great Britain : he had chosen the first alternative, because his safety, the interests

of his people, and above all the secret projects of the court of London imposed it on him as an imperious obligation. France was independent of the British crown : no engagement bound the king to maintain that crown in the integrity of its dominions, and still less to constrain its subjects to obedience : so that his majesty had no duty to fulfil in favour of England in respect to her North American colonies. He was bound neither to assist England against the colonies, nor to repulse the colonies when they presented themselves to him as an independent people. He had a right to consider as such the united people of an immense continent, presenting themselves in that character, above all since their former sovereign had shown by long and painful efforts the impossibility of reducing them to obedience.<sup>r</sup>

§ 13. French Ordinance of 1778 establishing the rule of free ships, free goods.

By the treaty of amity and commerce of the 6th February 1778, between France and the United States, it had been stipulated that free ships should make free goods. The French government issued an ordinance, on the 26th July, 1778, extending the benefit of this stipulation to all neutral powers. By the 1st article of this ordinance, the French cruizers were prohibited from seizing neutral vessels, even if bound from one enemy's port to another, unless actually blockaded, besieged, or invested. Neutral vessels, laden with contraband of war, were still subjected to capture, and the contraband articles to confiscation : but the vessel and the residue of the cargo were to be restored, unless the contraband amounted to three-fourths in value of the cargo, in which case both the vessel and the entire cargo were liable to confiscation. But his majesty reserved the faculty of revoking the freedom granted by this article unless the enemy should within six months from the date of the ordinance grant a similar concession.

The ordinance contained several other provisions respect-

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<sup>r</sup> Observations sur le Mémoire justificatif de la Cour de Londres. Flasan, tom. iii. p. 174.

ing the proofs of proprietary interest to be required from neutral vessels, and in other respects confirmed the dispositions of the title of prizes in the marine ordinance of Louis XIV, 1681.\*

In the meantime Spain had been drawn into the war as an ally of France under the family compact of 1761, and Great Britain had demanded in vain from Holland that assistance which the republic was bound to render by the subsisting treaties of alliance and guarantee between the two countries. Indeed appearances indicated that Great Britain was soon to encounter an enemy in her ancient ally. Her naval, commercial, and colonial superiority were thus threatened by a formidable confederacy of the maritime powers of Europe combined with the youthful energies of her own revolted colonies. In this extremity, the British cabinet turned its attention to Russia, as a power whose friendship and aid might be secured by the application of suitable means. Sir James Harris, (afterwards Lord Malmesbury,) was instructed to sound the disposition of the Empress Catharine, and for this purpose addressed himself to Panin, chancellor of the empire, and Potemkin, the reigning favorite of that princess. The former was unfavorable to the views of the British cabinet; but the latter opened to their ambassador the means of secret conference with the Empress, who consented to offer her armed mediation in the war between Great Britain on the one side, and France, Spain, and the United States on the other, as an equivalent for Russia being allowed to prosecute her designs on the Turkish empire. But the inclinations of the Empress were still resisted by Panin, who endeavoured to convince her that the true interests of the Russian state would not be promoted by such an alliance; and an official answer was accordingly returned declining the British overtures. Harris was disconcerted by this unexpected result,

§ 14. Origin  
of the Armed  
Neutrality of  
1780.

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\* Code des Prises, tom. ii. p. 671.

but received assurances from Potemkin, in the name of the Empress, of unchanged good will,—and an expression of the hope that circumstances would soon enable her to conform her conduct to her wishes.

An incident now occurred which seemed to favor the designs of the British negotiator. Two Russian vessels laden with corn, and bound to the Mediterranean, were seized by Spanish cruizers upon the ground that they were intended to supply the fortress of Gibraltar. The Empress instantly demanded satisfaction from the Spanish court, and was persuaded by Potemkin to order, without consulting Panin, the equipment of a fleet at Cronstadt, which was destined to co-operate with Great Britain against Spain and her allies, in case redress should be refused. The fitting out of the fleet could not long be concealed from Panin, nor did he doubt its destination. But he determined to carry into effect his own views by appearing to forward those of his rival. Far from appearing to oppose the designs of the Empress, he declared that he himself participated in her indignation at the conduct of Spain, and entirely approved of her determination to require satisfaction for the injury done to the neutral navigation of her subjects engaged in a lawful commerce. He would even go further: he would exhort his sovereign to seize this opportunity of solemnly announcing to Europe that she would not suffer the wars waged by other powers to affect injuriously the accustomed trade of Russia. He represented that such a course would secure the friendship and co-operation of all the neutral powers, and would compel Spain to grant complete satisfaction for the injury she had committed. The true principles of neutrality, sanctioned by the natural law of nations, had been hitherto too little respected in practice. They had hitherto wanted the support of a sovereign uniting sufficient power, wisdom, and benevolence to cause them to be respected. These requisites were now united in Catharine, and she had an opportunity of acquiring new titles to glory, of becoming a lawgiver to the high seas, of

restraining the excesses of maritime warfare, and affording to the peaceful commerce of neutrals such a security as it never had possessed.

The Empress was completely carried away by these representations so flattering to her pride and ambition. She ordered Panin to prepare a statement of the principles he had developed, to be communicated to the belligerent powers, as the rules to be observed for the security of Russian navigation and commerce, and to neutral states, as the basis of a league to be formed between them for the protection of neutral rights.<sup>1</sup>

In the declaration of the Empress of Russia, which was accordingly drawn up, under date of the 26th February, 1790, and communicated to the courts of London, Versailles, and Madrid, these rules are laid down as follows :

§ 15. Principles of the Armed Neutrality.

1. That all neutral vessels may freely navigate from port to port and on the coasts of nations at war.

2. That the goods belonging to the subjects of the powers at war shall be free in neutral vessels, except contraband articles.

3. That the Empress, as to the specification of the above mentioned goods, holds to what is mentioned in the 10th and 11th articles of her treaty of commerce with Great

<sup>1</sup> Von Dohm, *Denkwürdigkeiten meiner Zeit*, tom. ii. pp. 100-150. *Memoire sur la Neutralité armée* par M. le Comte de Goertz, page 104.

This account given by the Count de Goertz of the history of the armed neutrality is confirmed by what the Empress Maria Theresa said to Baron de Breteuil, minister of France. "Il n'y a pas," lui dit elle à l'occasion de la neutralité armée ; "il n'y a pas jusqu'à ses vues les plus mal combinées, qui ne tournent à son profit et à sa gloire ; car vous savez sans doute que la déclaration, qu'elle vient de faire pour sa neutralité maritime, avait d'abord été arrêtée dans des termes et dans des vues absolument favorables à l'Angleterre. Cet ouvrage avait été fait par la seule influence de M. le Prince Potemkin, et à l'insu de M. le Comte de Panin ; et cette déclaration, inspirée par l'Angleterre, était au moment de paraître, lorsque M. de Panin, qui en a été instruit, a trouvé moyen de la faire entièrement changer et de la tourner absolument en votre faveur." (*Flassan, Histoire de la Diplomatie Française*, tom. vii. p. 272, note.)

Britain, extending these obligations to all the powers at war.<sup>u</sup>

4. That to determine what is meant by a blockaded port, this denomination is only to be given to that where there is, by the arrangements of the power which attacks it with vessels, stationed sufficiently near, an evident danger in attempting to enter it.<sup>v</sup>

Such was the origin of the first armed neutrality of 1780. It sprung from no enlarged and beneficent views of improvement in the maritime law of nations hitherto sanctioned by general practice. It was the accidental result of a mere court intrigue, and of the rivalry between two candidates for the favour of a dissolute, ambitious, and vain-glorious woman. Catharine herself had a very imperfect idea of the immense importance of the measure she had adopted, and of the effects it might produce. So ignorant was she of commerce, that she flattered herself with having at once vindicated her own honour, and shown her strong regard for Great Britain. Panin took care not to deceive her, and fearing that his intrigue might fail, begged she would not communicate with any one until the couriers were sent off with the declaration. But she could not refrain from saying confidentially to the British ambassador that there would soon be delivered in her name to all the belligerent powers a manifesto which would be completely satisfactory to the British government; and condescended even to give him leave to communicate thus much to his court. The communication which he accordingly made raised its expectations to the highest pitch, and the disap-

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<sup>u</sup> The treaty of amity and commerce of 1766 between Great Britain and Russia, art. 10, restricts contraband to "munitions of war;" and the 11th article defines these to consist of "canons, mortiers, armes à feu, pistolets, grenades, boulets, balles, fusils, pierres-à-feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, épées, ceinturons, poches à cartouche, selles et brides, au delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, etc." (Martens, Recueil, tom. i. p. 395.)

<sup>v</sup> Annual Register, 1780, p. 347. Schoell, iv. 37.

pointment was proportionably greater when it learnt the true nature of the measures adopted by the Russian cabinet.

The British government dissembled its resentment, and replied to the Russian declaration with cold dignity, that his majesty had hitherto acted towards neutral powers "conformably to the clearest principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist, and agreeably to the tenor of his different engagements with other powers, where those engagements have altered this primitive law by mutual stipulations proportioned to the will and convenience of the contracting parties ;"—and that "strongly attached to her majesty the Empress of all the Russias by the ties of reciprocal friendship and common interest, the king, from the commencement of those troubles, gave the most precise orders respecting the flag of her imperial majesty and the commerce of her subjects, agreeably to the law of nations, and the tenor of the engagements stipulated by his treaty of commerce with her, and to which he shall adhere with the most scrupulous exactness."

Answer of  
G. Britain to  
the Russian  
declaration.

The court of Spain answered the Russian declaration by professing its determination to respect the neutral flag of all the powers that had consented, or should consent to defend it, until his catholic majesty ascertained what part Great Britain should take, and whether its navy and privateers would keep within due bounds. And to show to all the neutral powers how much Spain was desirous of observing, in time of war, the same rules of which she had claimed the observance whilst neutral, his majesty conformed to those laid down by Russia ; "with the understanding however that with regard to the blockade of Gib-

Answer of  
Spain.

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\* Answer of Great Britain, April 23d, 1780, to the declaration of the Empress of Russia. (Annual Register, 1780, p. 349.)



"raltar, *the danger of entering subsists as determined by the 4th article of the said declaration.*"<sup>x</sup>

Of France. The court of France answered, that the principles laid down by Russia were no other than the rules already prescribed to the French navy, the execution of which was maintained with an exactness known and applauded by all Europe. "The freedom of neutral vessels, restrained in a few cases only, is a direct consequence of natural law, the security of nations, and the consolation even of those who are afflicted by the scourge of war. The king has therefore been desirous to procure, not only to the subjects of her majesty the Empress of Russia, but to all other states which continue neutral, the freedom of navigation on the same conditions with those announced in the declaration, to which his majesty this day replies. The king believed that he had already advanced the general good, and prepared a glorious epoch of his reign, in establishing by his example those rights which every belligerent ought and must recognize as belonging to neutral vessels. This hope has not been vain, since the Empress, whilst engaging to observe the most exact neutrality, has declared in favour of that system which the king sustains at the price of the blood of his people, whilst she claims the same laws which his majesty would make the basis of the universal maritime code."<sup>y</sup>

Denmark and Sweden concurred in approving the principles of the Russian declaration, and notified their concurrence to the belligerent powers.

Answer of  
G. Britain to  
the Danish no-  
tification.

Great Britain answered to the Danish notification, that during the whole course of the present war with France and Spain, she had constantly respected the rights of all friendly and neutral powers, according to subsisting treaties, and according to the clearest and most generally recognized

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<sup>x</sup> Answer from the King of Spain signed by Florida Blanca, April 18th, 1780. Martens, Recueil, tom. iii. p. 164. ed. 1818.

<sup>y</sup> Answer of France, April 25th, 1780. Martens, Recueil, tom. iii. p. 162.

principles of the law of nations,—common to all nations who are bound by no special conventions. Such conventions existed between Great Britain and Denmark, and the Danish flag and commerce would continue to be respected according to their stipulations, which defined the mutual rights and duties of the two nations, and which could not be changed without their mutual consent. Until thus changed, they constituted an inviolable law for both parties, which had been observed, and would continue to be observed, by the British government with that spirit of equity which regulated all its conduct, and in the just expectation of reciprocal fidelity on the part of Denmark to its engagements.\*

To the notification of Sweden the British cabinet answered in a similar manner, with a special reference to the stipulations of the existing treaties between the two countries, which were clear and formal, and could not be changed without the mutual consent of the contracting parties. As such, they would be observed by Great Britain, as a sacred and inviolable law.\*

To the notification of Sweden.

Denmark and Russia concluded at Copenhagen on the 9th July, 1780, the convention of armed neutrality for the

\* Réponse de la Cour de Londres à la Déclaration Danoise du 8 Juillet, 1780. (Martens, Recueil, tom. iii. p. 182)

\* "Le 12 article du traité de 1661 réglant la forme du certificat dont les vaisseaux doivent être munis, en donne cette raison :

"Ne vero libera ejus modi navigatio, aut transitus federati unius, ejusque subditorum ac incolarum, durante bello alterius federati, terra marive cum aliis gentibus, fraudi sit altero confederato, mercesque et bona hostilia occultari possint.

"Le même article contient une stipulation précise et formelle. La voici :

"Si hostis bona in confederati navigio reperiantur, quod ad hostem pertinet, prædæ solum modo cedat, quod vero ad confederatum illico restituitur.

"Le traité de 1666 prescrit le même certificat, et en donne les mêmes raisons.

Réponse de la Cour de Londres à la déclaration de S. M. Suédoise. (Martens, Recueil, tom. iii. p. 188.)

maintenance of those principles by the equipment of a joint fleet, and for their mutual defence against any power who should attack either of the contracting parties on account of their reciprocal engagements. By this convention, to which Sweden acceded on the 9th September, 1780, the Baltic sea was declared to be *mare clausum* against the ships of war of the belligerent powers; and the contracting parties referred to their respective treaties with the belligerent powers for the definition of contraband.<sup>b</sup>

In the mean time a diplomatic struggle was going on in the United Provinces between the agents of France and Great Britain, the former seeking to confirm the republic in her resolution of remaining neutral, and the latter insisting on her furnishing the succours stipulated by the existing treaties of alliance and guarantee. In order to determine the conduct of the Dutch, the French government issued, on the 14th of January, 1779, an ordinance suspending the operation of the first article, that of the 26th July, 1778, in respect to their navigation, excepting that of Amsterdam. The operation of this ordinance was again suspended as respected the entire province of *Holland* on the 2d of July, 1779, which still continued to be privileged under the former ordinance of 1778. France thus sought to divide the councils of the republic, whilst the British court notified the States General that, if they did not, within the term of three weeks, furnish the stipulated succours, Great Britain would no longer consider their flag as privileged by treaty, but would conduct, in respect to it, according to the strict principles of the preëxisting law of nations. This menace was executed by the proclamation of the 17th April, 1780, which authorized the seizure of Dutch vessels, bound from one enemy's port to another, or laden with enemies property. Whilst thus agitated by alternate hopes and fears, the States General were invited by Russia to

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<sup>b</sup> Martens, Recueil des Traités, tom. iii. pp. 189, 205.

accede to the convention of armed neutrality which had been formed by the Baltic powers. After long delays and hesitation, the resolution for this purpose was, at length, passed on the 20th November, 1780; but it was even then not unanimous, the three provinces of Zealand, Guelders, and Utrecht, having refused their assent. This was followed on the 20th December, 1780, by a declaration of war against the United Provinces on the part of Great Britain, grounded upon the alleged fact of their having concluded a secret treaty acknowledging the independence of the United States of America. The United Provinces demanded from the northern powers the succours stipulated by the convention of armed neutrality; but this demand was rejected, upon the ground that the rupture between Great Britain and Holland, had actually taken place before the accession of the latter to the armed neutrality, and that the causes of war, stated in the British declaration, were entirely foreign to the objects of the neutral alliance.<sup>c</sup>

The United States of America acceded to the principles of the armed neutrality by the ordinance of Congress of the 7th April, 1781.

Prussia acceded to the armed neutrality on the 8th May, 1781.

Austria acceded to the principles of the armed neutrality, but not to the conventions by which it was formed, on the 9th October, 1781.

Portugal acceded to the conventions on the 13th July, 1782.

The king of the two Sicilies acceded to the conventions on the 10th February, 1783.<sup>d</sup>

The armed neutrality of the northern powers continued to hang as a dark cloud constantly menacing the safety of

<sup>c</sup> Schoell, *Histoire abrégée des Traités de Paix*, tom. iv. p. 53. Flassean, *Histoire de la Diplomatie Française*, tom. vii. pp. 282-297. Martens, *Recueil*, etc. tom. iii. p. 223.

<sup>d</sup> Schoell, tom. iv. pp. 55-57.

the British empire until the peace of 1783. Being engaged in war with France, Spain, Holland, and the United States of America, the addition of the hostility of those powers might have turned the already doubtful balance against her naval superiority. It was with this view, and also to detach Holland from the confederacy, that Great Britain offered, in 1782, to make a separate peace with the republic, under the mediation of Russia, on the basis of the treaty of 1674, by which, as Mr. Fox, then secretary of state for foreign affairs, stated in his communication to the Russian minister in London, "the principles of the armed neutrality are established in their widest extent to all the contracting parties. His majesty, therefore, does not make any difficulty to say, that he will accept, as the basis of a separate peace between him and the States General, a free navigation, according to the principles demanded by her imperial majesty in her declaration of the 26th February, 1780."<sup>e</sup>

This negotiation proved abortive, and Great Britain continued to act towards the powers which remained neutral during the American war, according to the preëxisting law of nations, as understood and practiced by her. She, however, asserted her maritime pretensions, with much forbearance and caution, and suffered the rule she had established in the war of 1756, relating to the enemy's colonial trade to slumber in oblivion.

Treaty of  
peace, 1783.

This war was finally terminated by the treaty of peace concluded at Versailles in 1783. By this treaty the independence of the United States of America was recognized by Great Britain, and the Floridas with the island of Minorca were restored to Spain. Senegal and the island of Tobago were ceded to France, which was also admitted in common with Great Britain and the United States to participate in the fisheries on the Banks of Newfoundland. All

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<sup>e</sup> Annual Register for 1782, p. 299.

the places taken in the East Indies were mutually restored, and Hyder Ali, with the other allies of France, invited to accede to the treaty. The maritime and colonial balance of power was thus in some measure restored, whilst France liberated herself from the military servitude imposed by the treaty of Utrecht, 1713, and confirmed by that of Aix la Chapelle, 1748, and of Paris, 1763, according to which the French government stipulated to demolish the fortifications of Dunkirk.

The treaty of peace of 1783 with France and Spain revived the treaties of peace and commerce of Utrecht, and consequently confirmed the maritime stipulations contained in the treaty of commerce of Utrecht in favour of the freedom of neutral navigation. But the treaty of peace of 1784 between Great Britain and Holland contains no equivalent stipulation.<sup>f</sup>

The same provisions were again inserted in the treaty of navigation and commerce between Great Britain and France of 1786. In the debate which took place in the British parliament upon the preliminaries of this convention, it was objected to these provisions by the Marquis of Lansdowne, that they contained a complete recognition of the principles of the armed neutrality by Great Britain. The only answer made to this objection was, that the stipulations in question were merely intended to provide for the very improbable case, that either of the contracting parties should be engaged in a maritime war, whilst the other should remain neutral, and not to furnish a general rule to be observed towards other nations.<sup>g</sup>

The United States of America had adopted the principle of *free ships, free goods*, with the associated maxim of *enemy ships, enemy goods*, in their treaties of 1782 with

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<sup>f</sup> Martens recueil, tom. iii. pp. 521, 543-560, tom. iv. pp. 168-173.

<sup>g</sup> Parliamentary History of England, vol. xxvi. p. 563.

the United Netherlands, of 1783 with Sweden, and with Prussia of 1785.<sup>a</sup>

§ 16. Treaty  
of 1785 be-  
tween the  
United States  
and Prussia.

The last mentioned treaty between the United States and Prussia contains two very remarkable stipulations for limiting the operations of war. By the 23d article of this treaty, it is provided, that "all women and children, scholars of every faculty, cultivators of the earth, artizans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall, but if any thing is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. And all merchant and trading vessels, employed in exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce."

By the 24th article, it is stipulated, that, "to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other, and to the world, that they will not adopt any such practice: that neither will send the prisoners, whom they may take from the other, into the East Indies, or any other parts of Asia, or

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<sup>a</sup> Elliot's American Diplomatic Code, vol. i. pp. 134, 168, 334.

Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations ; that they shall not be confined in dungeons, prison ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs ; that the officers, shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks, as roomy and good as are provided by the party in whose power they are, for their own troops : that the officers shall also be daily furnished by the party in whose power they are, with as many rations, and of the same articles and quality, as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army ; and all others shall be daily furnished by them with such rations as they allow to a common soldier in their own service ; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war ; and the said accounts shall not be mingled with, or set-off against any others, nor the balances due on them be withheld as a satisfaction or reprisal for any other article, or for any other cause, real or pretended whatever ; that each party shall be allowed to keep a commissary of prisoners, of their own appointment, within every separate cantonment of prisoners in possession of the other ; which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him ; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other what-



ever, shall be considered as annulling or suspending this, and the next preceding article ; but on the contrary, that the state of war is precisely that for which they are provided ; and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."<sup>i</sup>

§ 17. Franklin  
on privateer-  
ing.

These two articles were drawn up by Franklin, one of the negotiators of the treaty, whose philosophic mind had been early drawn to the question of mitigating the practices of war. At the time when he was engaged in negotiating the treaty of peace, 1783, between his own country and Great Britain, he communicated to Mr. Oswald, the British commissioner, his views on the practice of privateering. "It is for the interest of humanity in general, that the occasions of war, and the inducements to it, should be diminished. If rapine is abolished, one of the encouragements of war is taken away, and peace therefore more likely to continue and be lasting. The practice of robbing merchants on the high seas, a remnant of the ancient piracy, though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it, or to the nation that authorizes it. In the beginning of a war some rich ships, not upon their guard, are surprised and taken. This encourages the first adventurers to fit out more armed vessels, and many others to do the same. But the enemy, at the same time, become more careful, arm their merchant ships better, and render them not so easy to be taken ; they go also more under protection of convoys ; thus, while the privateers to take them are multiplied, the vessels subject to be taken and the chances of profit are diminished, so that many cruises are made wherein the expenses overgo the gains ; and as is the case in other lotteries, though some have good prizes, the mass of adventurers are losers, the whole expense of fitting out all

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<sup>i</sup> Elliot's American Diplomatic Code, vol. i. pp. 348-352.

the privateers, during a war, being much greater than the whole amount of goods taken. Then there is the national loss of all the labour of so many men during the time they have been employed in robbing; who, besides spending what they get in riot, drunkenness, and debauchery, lose their habits of industry, are rarely fit for any sober business after peace, and serve only to increase the number of highwaymen and housebreakers. Even the undertakers, who have been fortunate, are by sudden wealth, led into expensive living; the habit of which continues, when the means of supporting it cease; and finally ruins them: a just punishment for their having wantonly and unfeelingly ruined many honest, innocent traders and families, whose subsistence was obtained in serving the common interests of mankind."

So also in 1785, writing to a private friend, he says: "The United States, though better situated than any other nation to profit by privateering, are, so far as in them lies, endeavouring to abolish the practice by offering, in all their treaties with other powers, an article engaging solemnly, that in case of a future war, no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages unmolested."\*

The principles asserted by the powers confederated in the Armed Neutrality, and acknowledged by all the belligerent nations engaged in the war which was terminated by the peace of Versailles, 1783, except Great Britain, became soon afterwards the subject of discussion between two eminent Italian public jurists. In the act of accession to the treaties of armed neutrality, in 1783, by the King of the Two Sicilies, it is stated that the principles of that alliance were the same which he had always followed, and which had been followed by his father ever since the reestablishment of the independent monarchy in the two kingdoms,

§ 18. Galiani and Lampredi on the principles of the Armed Neutrality.

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\* Letters to B. Vaughan, Esq., Franklin's Works, vol. ii. p. 448.

and the same which had been recognized in the *only* treaties made by them since they had ceased to belong to the Spanish sovereignty. The Abbé Galiani published at Naples, in 1782, a treatise on the duties of belligerent and neutral sovereigns towards each other,<sup>1</sup> which may be considered as a defence of the principles maintained by the Neapolitan government, as he says it was written "in consequence of an irresistible order:" he also adds, "in a short time, and without the help of any book." Yet he cites a profusion of authorities, and among others criticises with some severity a much abler writer than himself, Lampredi, professor of public law in the university of Pisa, who had published, during the war of the American revolution, a work on the law of nature and nations, in which he incidentally considers the questions relating to belligerent and neutral rights.<sup>2</sup>

Subsequently to the appearance of Galiani's work, Lampredi published at Florence, in 1788, a separate treatise on the same subject, under the title of *Del Commercio dei Popoli Neutrali in Tempo di Guerra*.<sup>3</sup>

In this treatise, Lampredi lays down the fundamental principle, that the accustomed trade of nations at peace with those powers, who happen to become belligerent, is not legally affected by the war, and may be continued to be carried on, with the qualifications arising from the duty of granting and withholding impartially, the benefits of neutral commerce, in respect to all the belligerents. On the other hand, this right of the neutral to carry on his accustomed trade, is encountered by the equal right of the belligerent to subdue his enemy, and for that purpose to inter-

<sup>1</sup> *Dei Doveri dei Principi neutrali verso i Principi guerreggianti e di questi verso i Principi neutrali.* Napoli, 4to, 1782.

<sup>2</sup> Lampredi, *Juris publici universalis, sive Juris Naturæ et Gentium theorematum.* Liburni, vol. iii. 1776-1778.

<sup>3</sup> A French translation of this work was published at Paris in 1802, by M. Penchet with notes and additional documents.

cept all commercial intercourse with him, which has a direct tendency to augment his means of defence or attack, or to defeat a particular operation which might compel him to submit. Hence arises a collision between these two opposite rights of the neutral and the belligerent.

The right of the belligerent to weaken and subdue his enemy, might be pushed to the extent of interdicting all trade with the enemy, which may contribute to augment his resources, and strengthen his means of resistance. There are not wanting in history examples of such a pretension on the part of belligerent nations; but their claim has more generally been limited to the right of intercepting certain articles, directly useful in war, or without which the enemy could not continue his resistance; and of interdicting all trade with places besieged or blockaded, by which their surrender might be indefinitely protracted. Lampredi considers the right of the belligerent to capture such articles as are deemed contraband of war, and to interdict all trade with blockaded places, and the correspondent duty of the neutral to submit to such prohibitions, as arising, not from the primitive or natural law of nations, binding on all men, at all times, and in all places; but as depending on the conventional law, as evidenced in treaties and the usage of nations, which have continually fluctuated, according to the variations in the nature of maritime commerce, and the manner of carrying on naval hostilities.

From these postulates, this public jurist deduces the corollary, that the trade in those articles, termed contraband of war, is not prohibited, by the natural law of nations, or because the duties of neutrality require that those nations which remain at peace should abstain from this traffic; but because they have either expressly promised not to protect their subjects engaged in this trade, and to abandon their property to confiscation by the enemy; or have tacitly adhered to the usage prevailing in this respect, among the greater part of nations. If the right to capture and confiscate articles contraband of war were considered as an ab-

solute right on the part of the belligerent, and the abstaining from the traffic in such articles as an absolute duty on the part of the neutral nation, arising from the primitive law of nations, both the right and the duty would be much more extensive than they actually are. They would authorize the belligerent to demand from the neutral, not merely his acquiescence in the capture and confiscation of the property of his subjects, but an absolute prohibition of the exportation of contraband articles from the neutral country, when destined for the enemy's use. The refusal, on the part of the neutral, to publish and enforce a prohibition of all traffic with the enemy in contraband articles, would be such a departure from the duties of neutrality, as would authorize the other belligerent to consider the pretended neutral as an enemy.

There is, then, no law which prohibits the neutral from furnishing the enemy of one of the belligerent parties with articles contraband of war; provided he extends the benefit of his commercial intercourse impartially to both parties; and on the other hand there is no law which prevents the belligerent from intercepting such articles destined to his enemy and confiscating them for his own use.

Lampredi then proceeds to consider an idle question raised by Galliani, "whether the conventional law of nations, interdicting the trade with the enemy in articles contraband of war, extends to the sale of the same articles within the neutral territory?"

Galiani pretends that it does, and that a ship, for example, built and armed for war in a neutral port, cannot be there lawfully sold to a belligerent.<sup>o</sup> Lampredi takes a great deal of superfluous pains to fortify, both by reason, and an appeal to the authority of treaties and of preceding public jurists, his own opinion that the transportation to the

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<sup>o</sup> Galiani, *Dei Doveri dei Principi Neutrali verso i Principi guerreggianti* e di questi verso i Neutrali, cap. ix. § 14.

enemy of contraband articles alone is prohibited ; but that the sale of such articles, within the territory of the neutral country, is perfectly lawful. He admits that there may be instances where neutral nations, from a prudent desire of avoiding any collision with powerful belligerents, may have prohibited the trade in contraband of war within the territory ; but he asserts that Venice was the only example, during the war of the American revolution, of a neutral state absolutely prohibiting such a traffic. Naples only prohibiting the building, for sale, of vessels of war, and the exportation of other contraband articles ; whilst Tuscany permitted her subjects to continue their accustomed trade in such articles, both within the territory, and for exportation ; subject, in the latter case, to the belligerent right of seizing contraband goods going for the enemy's use.<sup>P</sup>

In considering the question, what are the articles which are liable to confiscation, when captured on the high seas being destined to the enemy's use, Lampredi refers again to the conventional or voluntary law of nations, resulting from treaties and usage, by which the collision between the conflicting rights of belligerents and neutrals, under the primitive law, has been practically accommodated to the necessities of self defence in war and the convenience of maritime commerce. The conventional, or voluntary law of nations, in this respect, has undergone many fluctuations ; but it has ever considered all such articles as contraband which serve exclusively for the purposes of war. As to articles of promiscuous use, or those natural and artificial substances, which, in their ordinary state, are not directly useful in war, but which may be wrought into war-like instruments, such as saltpetre, sulphur, iron, lead, copper, and naval stores ; or those, without which war cannot

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<sup>P</sup> Lampredi, *Del Commercio del Popoli Neutrali in tempo di Guerra*, pt. i. §§ 1-8.

be carried on, such as money, and provisions, there is no consistent rule to be collected from the variable and contradictory practice of nations. Still a constant tendency might be observed in treaties towards the establishment of the principle which limits the list of contraband to such commodities as serve in their ordinary state for the purposes of war, excluding such as have not yet been worked into the form of a warlike instrument. Such was the definition of contraband contained in the treaty of commerce of 1778, between France and the United States, and in the treaties of armed neutrality of 1780, between the Baltic powers. But the prohibition of sulphur and saltpetre by those treaties involves the inconsistency of prohibiting the two articles, from which, with the addition of a third article, gunpowder may be made, but which have not yet been worked into the shape of that warlike instrument.<sup>1</sup>

In considering the question, whether the neutral flag protects from capture the goods of an enemy, we encounter, according to Lampredi, the same collision between two opposite conflicting rights belonging to the neutral and the belligerent respectively, as in the case of contraband. The neutral has, by the law of nations, an unquestionable right to continue to transport, in time of war, the goods of his friend, who has become my enemy ; and I, (the belligerent,) have an equally unquestionable right to weaken and disable my enemy by capturing his property on the high seas. The positive and conventional law of European nations on this subject has fluctuated according as the necessities of war or the convenience of commerce have preponderated. The *Consolato del Mare*, and the earlier treaties before the seventeenth century subjected the goods of an enemy in the ship of a friend to capture and confiscation. Many of these treaties subjected to the same liability the goods of a friend in the ship of an enemy, adopting the maxim of the

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<sup>1</sup> Lampredi, Pt. i. § 9.

old French law *que la robe d'ennemi confisque celui d'ami*. The earliest treaty which established the maxim of free ships free goods was that of Henry IV, with the Sublime Porte in 1604, by which the French flag and pass were declared to protect from capture the goods of the enemies of the Porte. Lampredi enumerates a number of other treaties between the Christian powers of Europe, during the seventeenth century, and the beginning of the eighteenth, including the treaties of Utrecht, 1713, by which the maxim of *free ships, free goods*, usually coupled with the maxim of *enemy ships, enemy goods*, was established as the conventional law between the contracting parties. Notwithstanding these stipulations, the very parties to these treaties, the instant they became engaged in war, refused to extend the benefit of them to others, and influenced by motives of interest, pursued in practice maxims directly opposite to those they had thus solemnly professed. Hence, in the war of 1740, was revived the ancient practice of capturing enemy's property in the vessels of a friend. The neutral powers remonstrated: some of them retaliated, especially Prussia; all endeavoured to secure an exemption by special treaties. The United States of America obtained the privilege, by their treaty of 1778, from France. At last, the Empress of Russia, Catharine II, sought to erect these special exemptions into a general law, by the celebrated alliance of the armed neutrality of 1780; to the principles of which nearly all the maritime powers of Europe acceded; but Great Britain dissented, referring to her particular treaties with the Baltic powers, and to the common law of nations, for the rule by which she would be guided as a belligerent.

There is then, according to Lampredi, no fixed and positive law of nations, establishing a uniform, invariable, and constant rule, by which these two conflicting rights of the belligerent and neutral may be practically reconciled. The firm establishment of the rule of *free ships, free goods*, is doubtless most fervently to be desired, as highly favourable



to the freedom of commerce and navigation in time of war. Still it may be permitted to the impartial public jurist to inquire, whether those nations, who refuse to adopt this maxim, offend against the primitive law of nations in capturing the goods of their enemy on board of neutral vessels.

Hübner is the principal writer, who has the most strenuously maintained that, by what he calls the natural and universal law of nations, the flag of a friend covers the property of an enemy.\* In treating this matter he has, (according to Lampredi,) confounded together two questions perfectly distinct. The first is, whether the belligerents have a right to prohibit, in time of war, the commerce carried on by neutrals in time of peace, such as is the carrying trade? And the second is, whether the belligerent has a right to capture the property of his enemy on board of neutral vessels?

Respecting the first of these questions, there can be no doubt that the neutral has a right to continue in time of war his accustomed trade in time of peace, except in contraband articles. As to the second, Lampredi holds that the belligerent has a right to capture the property of his enemy on the high seas, although found on board a neutral vessel, provided the neutral master receive an adequate indemnity for the loss of his freight and demurrage. The capture of enemy's property, as a means of weakening his resources and reducing him to submission, is a legitimate belligerent right, which may be exercised in any place where acts of hostility are permitted by the law of nations; namely, within the territory of the belligerent, or of his enemy, or in any other place not subject to the jurisdiction of any particular sovereign. Now the ocean is such a place as that last mentioned. The belligerent has consequently a

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\* *De la Saisie des Batimens Neutres*, 2 tomes, à la Haye, 1789.

right to capture on the high seas the property of his enemy on board of whatever vessel it may be found.\*

Here then are two equally incontestable rights directly in collision. If the neutral flag protects enemy's property, the belligerent right of capturing that of his enemy is defeated. If the neutral flag does not protect enemy's property, the right of the neutral to carry on his accustomed trade is violated. The simultaneous exercise of both these conflicting rights is evidently impossible. It is therefore necessary to consider which according to the rules of justice, and the interest of nations, should give way to the other.

In order to determine this question, Lampredi supposes several cases where the civil law allows private pursuits to be interrupted, and private property to be taken for the public use, in case of urgent necessity, allowing an adequate indemnity to the injured party. What, after all, (he asks,) is the injury sustained by the neutral by the capture of his vessel laden with enemy's property, provided the vessel is restored, and he is paid his freight, as required by treaties and the usage of nations? It results merely in the delay, and possible loss of a return voyage. On the other hand, the non-exercise of the belligerent right may involve the fatal consequence that the entire commerce of the enemy might be carried on under the neutral flag, and thus escape from capture, to the great injury of the belligerent, whose main object in maritime warfare is to destroy his enemy's commercial resources and revenue which are the sinews of his naval power. There can be no comparison

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\* Heineccius, speaking of this subject, says: "*Idem statuendum arbitramur, si res hostiles in navibus amicorum reperiantur. Illas capi posse, nemo dubitat, quia hosti in res hostis omnia licent, eatenus, ut eas ubicunque repertas sibi possit vindicare.*" (De Nav. ob Vect. Merc. Vetit. Comm. cap. ii. § 9.) The expression of Heineccius *ubicunque*, must, however, be limited to such places, where hostilities may lawfully be exercised. (Lampredi, pt. i. § 10.)

between the relative importance of the two rights here brought in collision. Hence it is reasonable that the exercise of the first mentioned right should be suspended in favour of the second, subject to an equitable indemnity.<sup>†</sup>

By the primitive law of nations, it is evident that the belligerent has no right to capture and confiscate the property of a friend, even if found in the enemy's territory. Still less has he a right to capture the property of neutrals found on board the vessels of an enemy, which cannot (according to Lampredi,) be considered as forming a portion of the territory of the belligerent power whose flag they bear. This principle, founded upon reason, is consecrated by the *Consolato del Mare*, and in the earlier treaties between different maritime states. By imperceptible degrees the maxim *que la robe d'ennemi confisque celui d'ami* crept into the jurisprudence of several nations; and it was adopted, by treaty, in almost every instance where the opposite maxim, that the flag of a friend should cover the property of an enemy, was recognized as the law between the contracting parties. There appears to be no natural, or necessary connection between the two maxims of *free ships, free goods*, and *enemy ships, enemy goods*; although they have been frequently associated in treaties, as equivalent concessions, the one of belligerent, and the other of neutral rights, and with a view to simplify the inquiry into the proofs of proprietary interest by making all to depend upon the character of the ship.

The right of capturing articles contraband of war and enemy's property, on board neutral vessels on the high

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<sup>†</sup> Lampredi here quotes in support of his opinion, the *Consolato del Mare*, the compilation of which he attributes to the Pisans, in the eleventh century. He states that it became the general maritime law among all the commercial nations of Europe from the time it was published. This great celebrity was due to the wisdom of its decisions, to the spirit of equity which dictated the laws it contains, and to its analogy with the general usages of maritime nations. (Lampredi, pt. i. § 10.)

seas, draws after it the belligerent right of visitation and search, as means necessary to ascertain whether the neutral vessel is engaged in carrying such goods as are liable to capture. Resistance by the neutral to the exercise of this latter right is unlawful, and is justly punished with confiscation, by the marine ordinances of every nation, in virtue of the conventional law of nations, which is but an application of the primitive law of nature, authorizing the the employment of force against whoever resists the exercise of a lawful right.\*

The universal usage and consent of nations has authorized the belligerent state to establish, within its own territory, courts of prize, competent to decide upon the lawfulness of captures made by its commissioned cruisers on the high seas, and brought into its ports for adjudication. Lampredi inquires, whether this usage be consistent with reason, and the primitive law of nations? He states that the seizure of a neutral vessel on the high seas, on suspicion of being laden with contraband or enemy's property, and the bringing the vessel and cargo into a belligerent port for further examination, is not an act of aggression against the sovereign to whose subjects the vessel belongs. Nor is the jurisdiction exercised by the prize courts of the captor's country over the captured property, a jurisdiction exerted over the neutral nation. It is a jurisdiction delegated by the sovereign to his judicial tribunals, in order to enable him to decide, whether he shall affirm the seizure, which has been made in the exercise of the rights of war, under his authority, and for the consequences of which he is responsible to the neutral sovereign. Hübner had objected, that though the sovereign has jurisdiction over the captors, who are his subjects, he has no right to judge those who are not his subjects, and who are brought involuntarily within his territory. To which Lampredi answers, that the

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\* Lampredi, pt. i. § 12.

jurisdiction in question is not ordinary civil jurisdiction ; it is merely a mode of exercising the rights of war, and of regularizing its operations, so as to prevent its degenerating into piracy. If the result of the judicial inquiry instituted by the sovereign of the captor produces the restitution of the captured property, the neutral has no ground of complaint, provided he receives an adequate indemnity in the case of a seizure without probable cause. If, on the other hand, it results in the confiscation of the captured property, the neutral claimant, who considers himself aggrieved by an unjust sentence of the belligerent prize tribunal in the last resort, must have recourse to the interposition of his own government with that of the captor. If the belligerent sovereign adopts the acts of his commissioned cruizers and tribunals, and confirms the seizure and condemnation of property claimed as neutral, he makes himself responsible for their acts towards the neutral sovereign. The controversy thus becomes an affair of state, to be treated of between government and government ; and must be terminated either by amicable negotiation, or by reprisals in the case of an ultimate denial of justice. To reverse this order of proceeding, and to make the neutral sovereign the sole judge of the validity of captures of vessels navigating under his flag, as proposed by Galiani, would be liable to the same objection urged by Hübner against the present mode of proceeding, that it would extend the jurisdiction of the neutral sovereign over the captors, who are not his subjects, to the exclusion of their own sovereign, who is alone responsible for their misconduct. According to the plan proposed by Galiani, to constitute the consuls of the neutral powers, resident in the ports of the belligerent state, judges of the validity of captures brought into those ports, neither the things in controversy, nor the parties to the controversy, would be within the territorial jurisdiction of the neutral power, who is thus to determine it, by its delegates sitting in a foreign territory. He alleges, as a precedent in favour of his proposition, the jurisdiction habitually exercised by

the English commissaries at Leghorn over captures made by their cruizers in the Mediterranean, and carried into the ports of Tuscany, without any objection on the part of the neutral sovereign of that country. To which Lampredi replies, that even if the fact were as stated by Galiani, it would not be sufficient to justify his project, since the jurisdiction exercised by the English commissaries at Leghorn, is the ordinary prize jurisdiction of the belligerent, exercised over persons and things temporarily situated within the neutral territory, but still subject to the authority of the belligerent sovereign.

This brings Lampredi to consider the question as to the competent tribunal to determine the validity of captures, brought, not within the territorial jurisdiction of the sovereign, under whose authority the captures are made, but within that of a neutral sovereign, whose subjects are no parties to the controversy. And he does not hesitate to decide that the possession of the captor, *jure belli*, of the captured property, brought into a neutral port, gives to the belligerent sovereign the exclusive right of determining the validity of the seizure, thus made and continued under his authority; that the neutral sovereign is bound to respect the possession of the captor as that of his sovereign; and cannot himself undertake to determine the validity of the capture, nor to interfere with the execution of the sentence, either of condemnation or restitution, which may be pronounced by the competent belligerent tribunal, provided such sentence be pronounced without the limits of the neutral territory, within which no foreign power can usurp the rights of sovereignty. Thus the captures made by British cruizers in the Mediterranean, and brought into the neutral port of Leghorn, had ever been adjudicated, either by the British court of vice-admiralty sitting at Minorca whilst that island belonged to Great Britain, or by the High Court of Admiralty in England. It is true that the prize commissioners delegated by these courts were permitted to examine the captured persons and papers of the vessels

brought into that port, in order to determine the preliminary question whether there was such probable cause of capture as to warrant further judicial proceedings, in which case the cause was immediately evoked to the competent tribunal sitting in the belligerent country. The only two cases, according to Lampredi, in which the neutral sovereign can interfere through his tribunals to take incidental cognizance of the validity of belligerent captures brought within his tefritorial jurisdiction are :

1. Where the capture has been made within the neutral territory itself, or by an armament fitted out in the ports of the neutral state in violation of its laws and treaties.

2. Where the captured party complains to the neutral sovereign that his property has been piratically seized by captors, under colour of a belligerent commission, to which they are not lawfully entitled. In this case the neutral tribunal may so far interfere as to inquire into the validity of the commission under which the capture was made.\*

§ 19. Moser,  
b. 1701, d.  
1785.

One of the distinguished German public jurists of the period now in question was John Jacob Moser, born in 1701, at Stuttgart, at which place he died in 1785. He devoted his long and laborious life to the cultivation of the kindred sciences of the public law of Germany, and of Europe. After having taught as a professor in several German universities, he founded, in 1749, at Hanau, an academy for the instruction of noble youth intended for public life. He was subsequently invited to return to his native country, where he filled the post of consulting counsel to the states of Wurtemberg. The states were, at that time, engaged in a controversy with the sovereign respecting their privileges, and presented to the duke a very strong remonstrance, which his ministers considered as seditious, and of which they accused Moser of being the author. He was in consequence, arbitrarily arrested in 1759, and im-

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\* Lampredi, pt. i. § 14.

prisoned in the fortress of Hohentwiel, where he was detained for five years. During the greater part of this time he was deprived of the use of pen, ink, and paper, and even of books, except the evangelists and the psalms. The states appealed to the aulic council of the empire, in order to obtain his liberation, and he was at last discharged, his persecutor acknowledging his innocence, and conferring a pension of fifteen hundred florins. From this time Moser devoted himself exclusively to his literary occupations, and produced innumerable works upon his favourite sciences and other miscellaneous subjects. His principal work, entitled an "Essay on the most modern Law of European Nations in Peace and in War," contains a rich mine of materials for illustrating the questions of most frequent recurrence in positive or practical international law. He had previously published a number of elementary works on the science, the whole forming an immense collection, which has been freely used by more recent and less industrious public jurists. His principal aim, in the first mentioned work, was to teach the law of nations by modern examples, drawn from their mutual intercourse, of what had been most generally approved in their varying practice. In selecting these examples, he begins with the epoch of the Emperor Charles VI, 1740, deeming all reference to antecedent cases superfluous, as having been already sufficiently illustrated by preceding writers. He disclaims, in a somewhat original, quaint, and antiquated style, all pretension to write a treatise upon the natural, or what he calls the philosophical law of nations, grounded upon the speculations of private men, as to what ought to constitute the rule of justice between nations, independent of positive compact or usage. "I write," says he, "no scholastic international law, grounded upon the application of natural jurisprudence, as understood by its teachers, to regulate the conduct of nations, considered as moral persons; I write no philosophical international law, constructed according to certain fanciful notions of the history and nature



of man ; and lastly, I write no political international law, in which dreamers like the Abbé de Saint Pierre, fashion the political system of Europe according to their fancies, administering their infallible nostrums to its sovereign rulers : but I write an essay on that mere positive international law, by which the sovereign, or demi-sovereign states of Europe, are wont to be guided in their mutual intercourse in war and in peace.”<sup>w</sup>

This is certainly a somewhat narrow view of the scope and object of the law of nations, reducing it merely to the positive rules to be collected from the practice of nations, laying entirely out of view those general principles of justice which have commonly been referred to, as constituting its basis, under the name of natural law. In order to justify this view of the science, Moser inquires what is this so much talked of law of nature ? Are we to seek for its principles in Grotius, or in Hobbes ? And when we have discovered its true principles, how far will they go in determining those practical questions which occur in the intercourse of states ? He holds that mere abstract principles of justice are very little regarded by rulers and statesmen, and considers treaties and usage as the two main foundations of that code which is really respected by nations in their mutual relations. Treaties constitute the law, not only between the states who are parties to them, but a succession of treaties will go far to establish a rule for the guidance of all nations. Usage is to be collected from precedents, or examples of what has most frequently been approved in the varying practice of nations. The rule must be inferred from the examples, and not applied *a priori* to test the validity of a particular precedent.\*

<sup>w</sup> Moser, Versuch, etc. i. Th. § 17.

\* The following is a list of Moser's works on international law in chronological order.

Anfangsgründe der Wissenschaft von der gegenwärtigen Staatsverfassung

George Frederick von Martens published in 1785, a syl-  
labus of his lectures at the university of Göttingen on the  
practical or positive European law of nations.<sup>7</sup> This work  
the author subsequently enlarged into a summary of the  
modern European law of nations, which first appeared in  
1788, and has since passed through several editions, revised  
and corrected by the author, until it has become a justly  
esteemed manual of the science.<sup>8</sup>

In these elementary works, the learned author adopts the  
fundamental idea of Vattel, that the positive law of nations  
is a modified application of the law of nature to regulate  
the mutual intercourse of the independant societies of men  
called states. The mere law of nature is obviously insuf-

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von Europa, und dem unter denen europäischen Potenzen üblichen Völker  
oder allgemeinen Staatsrechte, i. ter Theil, Tübing. 1732, 8vo.

Of this work, only the first part appeared, and the author published in  
1736 in the second part of his *vermischten Schriften* his

Entwurf einer Einleitung zu dem allerneuesten europäischen Völker-  
rechte in Friedens-und Kriegszeiten, etc.

He afterwards published for the use of his pupils in the *Staats und Canz-  
leyacademie* founded by him at Hanau :

Grundsätze des jetzt üblichen europäischen Völkerrechts in Friedenszeit-  
en, Hanau, 1750, 8vo.

And,

Grundsätze des jetzt üblichen europäischen Völkerrechts in Kriegszeiten,  
Tübingen, 1752, 8vo.

In 1778 he published at the request of the Duke of Wurtemberg a ma-  
nual of the science under the title of

Erste Grundlehren des jetztigen europäischen Völkerrechts in Friedens-  
und Kriegszeiten, Nürnberg. 1778, 8vo.

In 1777 he commenced the publication of a larger work, which was com-  
pleted in 1780, under the title of

Versuch des neuesten europäischen Völkerrechts in Friedens-und Kri-  
egszeiten, etc. 1777-1780. 10 Theil. 8vo, or Beyträge in Friedenszeiten,  
5 Th. 1778, in Kriegszeiten, 3 Th. 1779.

<sup>7</sup> *Præcis linæ Juris Gentium Europæarum practici in usum auditorum  
adumbratæ.* Göttingæ, 1785, 8vo.

<sup>8</sup> *Précis du Droit des Gens Moderne de l'Europe fondé sur les Traités et  
l'Usage,* à Göttingue, 1788, en Allemand, 1796: 2de édit. en Français,  
1801, 3eme édit. 1821, 8vo.

ficient to regulate that intercourse between any two nations. Various circumstances may require it to be modified either by mitigating the rigor of the primitive law, supplying its silence, or determining doubtful points. The result of the modifications thus made by mutual consent constitutes the positive, arbitrary, and special law of nations between these two nations ; which may be either conventional or customary, according as it rests upon compact, either express or implied, or upon mere usage. In this sense, there are as many special international laws in Europe, as there are special relations between every particular nation and any other. We may imagine that a still greater number of states, or even all those of Europe, might define their reciprocal rights by express compact, and guaranty the rights thus defined by a federal union. There would then be a fixed code of the positive law of nations, acknowledged by all, and obligatory upon all nations. But no such general compact has yet resulted from any of the various European Congresses assembled at different periods, or from the projects of perpetual peace suggested by speculative writers. No such code of positive international law therefore exists or probably ever will exist.

On the other hand, the treaties and usages existing between particular nations cannot be considered as obligatory upon others, except so far as they are adopted as a general rule to govern the conduct of those who accede to them. Still a general theory of the positive European law of nations may be construed by considering :

1. That the special treaties concluded between particular states resemble each other so much in their essence, that we may deduce from them the principles generally acknowledged by those nations, which have been in the habit of concluding treaties on similar matters.

2. In the same manner we may deduce the general principles acknowledged by all, or at least the greater part of nations, from the special usages which have been established between two particular nations.

3. The usages thus established among the greater part of nations, especially the most powerful, are easily adopted and imitated by the rest.

4. The frequent appeals by the European powers to the customary law of civilized nations give to it an obligatory force, which dispenses with the necessity of seeking for the proof of the introduction of the particular usage in question.

5. Treaties, which are binding on the contracting parties only, often serve as a model for other treaties to be concluded with other powers, and the habit of concluding treaties containing certain stipulations thus insensibly grows up. It also sometimes happens that what is stipulated, by treaty, between certain powers, is adopted, by usage, between others; so that it forms a conventional law for the former, and a customary law for the latter.

By thus collecting the principles most generally followed by the greater part of European nations, either in virtue of special compacts, express or implied, identical or analogous, or in virtue of usages of the like nature, we may construct a complete theory of the general, positive, modern, and practical European law of nations. There is no universal positive law of nations, binding on all nations, of whatever race, or religion, or degree of culture. For though the United States of America, planted in another hemisphere, have adopted the European law of nations—yet the Ottomans, inhabiting the same quarter of the globe, remain still, in many respects, strangers to the international law which prevails between the states of Christendom. This law has gradually grown up with the progress of Christianity and civilization, commerce and colonization, the multiplication of alliances and extension of diplomatic relations, the establishment of the balance of power, finally all those causes which have jointly contributed to form that great society of nations now existing in Europe. The European law of nations has varied at different epochs. Some of its principles may be traced back to the peculiar institu-

tions and manners of the middle age. For the origin of others we must look to the era of the Reformation and the reign of Henry IV in France. But in general the principal epoch of the modern law of nations dates from the peace of Westphalia; since which that of Utrecht, confirming the political system of Europe, has given new strength to the positive law of nations.<sup>a</sup>

§ 21. Bentham, b. 1749. d. 1832. Project of Perpetual Peace.

The fragments of an essay on international law by Jeremy Bentham, recently published from MSS. bearing date from 1786 to 1789, deserve to be mentioned in this connection, as bearing the stamp of the same original and vigorous mind which marks the more complete works of that great law-reformer. These fragments consist of four short essays:—1. On the objects of international law. 2. On the subjects, or personal extent of the dominion of the laws of any state. 3. On war, considered in respect to its causes and consequences. 4. A plan for an universal and perpetual peace.

From the extreme condensation of thought and conciseness of language in these essays, written in their author's best days, before the original simplicity of style, which marks his earlier works, and which he ever preserved in conversation, degenerated in his written compositions into an affected, laboured, and obscure phraseology, clouding his thoughts, and deterring the reader from wading through their long and intricate constructions, and almost unintelligible terminology; it becomes very difficult to give, within

<sup>a</sup> Martens, *Primæ linie Juris Gentium*, etc. Proleg. §§ 1–5. *Précis du Droit des Gens*, etc. Introduction, §§ 1–10.

Martens was followed by another German writer of considerable merit, Günther, the first volume of whose work on the “European Law of Nations in Time of Peace, according to Reason, Treaties, Usage, and Analogy,” appeared in 1787. It was followed by a second in 1792, but the author's intention of completing his design with an essay on the law of nations in time of war was never fulfilled.

*Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen, und Herkommen*, 2 Theile, 8vo. Altenburg, 1787, 1792.

any reasonable limits, any thing like a clear analysis of the principles deemed by the author essential to the construction of a universal international code. In the first essay he sets out with inquiring: "If a citizen of the world had to prepare such a code, what would he propose to himself as his object?" He answers, that "It would be the common and equal utility of all nations: this would be his inclination and his duty." And inquires further, "Would, or not, the duty of a particular legislator, acting for one particular nation, be the same with that of a citizen of the world?" He concludes that whatever answer may be given to this last question, however small may be the regard which it might be wished the legislator should have for the common utility, it will not be the less necessary that he should understand it. "This will be necessary for him on two accounts: in the first place, that he may follow this object, in so far as his own particular object is comprised in it; second, that he may frame, according to it, the expectations he ought to entertain, the demands he ought to make upon other nations. For the line of common utility once drawn, this would be the direction towards which the conduct of all nations would tend: in which their common efforts would find least resistance—in which they would operate with the greatest force,—and in which the equilibrium, once established, would be maintained with the least difficulty."

Our author mentions, as a practical example of the application of this theory, the adoption, by so many nations of the principles of the armed neutrality, proposed by the Empress Catherine in 1780. How formidable soever might be the initiating power, there was no reason to think that it was fear which operated upon so many nations, together so powerful, and some of them so remote; it must have been the equity of the proposed system, that is to say, its common utility, or, what amounts to the same thing, its apparent utility, which determined their acceptance of it.

He goes on to observe, that "it is the end which determines the means. The end of the conduct which a sovereign ought to observe relative to his own subjects, the end of the internal law of a society ought to be the greatest happiness of the society concerned. The end of the conduct a sovereign ought to observe towards other men, what ought it to be, judging by the same principle? Shall it again be said the greatest happiness of his own subjects? Upon this footing, the welfare, the demands of other men, will be as nothing in his eyes: with regard to them, he will have no other object than that of subjecting them to his wishes by all manner of means. He will serve them as he actually serves the beasts, which are used by him as they use the herbs on which they browse—in short, as the ancient Greeks, as the Romans, as all the models of virtue in antiquity, as all the nations with whose history we are acquainted, employed them.

"Yet in proceeding in this career, he cannot fail always to experience a certain resistance—resistance similar in its nature and in its cause, if not always in its certainty and efficacy, to that which individuals ought from the first to experience in a more restricted career; so that, from reiterated experience, states ought either to have set themselves to seek out,—or at least would have found their line of least resistance, as individuals of that same society have already found theirs; and this will be the line which represents the greatest and common utility of all nations taken together.

"The point of repose will be that in which all the forces find their equilibrium, from which the greatest difficulty would be found in making them to depart.

"Hence, in order to regulate his proceedings with regard to other nations, a given sovereign has no other means more adapted to attain his own particular end, than the setting before his eyes the general end,—the most extended welfare of all the nations on the earth. So that it happens that this most vast and extended end,—this foreign end—will

appear, so to speak, to govern and to carry with it the principal, the ultimate end; in such manner, that in order to attain to this, there is no method more sure for a sovereign than so to act, as if he had no other object than to attain to the other; in the same manner as in its approach to the sun, a satellite has no other course to pursue than that which is taken by the planet which governs it."

The author therefore suggests that we should suppose this to be the end aimed at by the law, which ought to regulate the conduct of nations in their mutual intercourse. The objects of an international code for any given nation would then be :

1. General utility, in so far as it consists in doing no injury to other nations, saving the regard which is proper to its own well being.

2. General utility, in so far as it consists in doing the greatest possible good to other nations, saving the regard which is proper to its own well being.

3. General utility, in so far as it consists in not receiving any injury from other nations, saving the regard due to the well being of these same nations.

4. General utility, in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well being of these nations.

"It is to the two former objects that the *duties*, which the given nation ought to recognize, may be referred. It is to the two latter that the *rights* it ought to claim may be referred. But if the same rights shall, in its opinion, be violated, in what manner and by what means, shall it seek for satisfaction? There is no other mode but that of war. But war is an evil; it is even the complication of all other evils."

5. The fifth object of an international code would be, to make such arrangements, that the least possible evil may be produced by war, consistently with the attainment of the good which is sought for.



"A disinterested legislator upon international law would seek to promote the greatest happiness of all nations generally, by following the same course he would follow in regard to internal law. He would endeavour to prevent positive international offences, to encourage the practice of positively useful actions. He would regard as a positive crime, every proceeding by which the given nation should do more injury to foreign nations collectively, whose interests might be affected, than it should do good to itself. For example, the closing against other nations the seas and rivers which are the highways of the globe. In the same manner he would regard as a negative offence every determination, by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to such foreign nation, than it would produce evil to itself. For example, if having in its own power offenders against the laws of the foreign nation, it should neglect to do what depends upon it to bring them to justice.

"War is a species of procedure by which one nation endeavours to enforce its rights at the expense of another. It is the only method to which recourse can be had, when no other means of satisfaction can be found by complainants, having no arbitrators between them sufficiently strong, absolutely to take from them all hope of successful resistance. But if internal procedure be attended by painful ills, international procedure is attended by ills infinitely more painful;—in certain respects, in point of intensity, commonly in point of duration, and always in point of extent.

"The laws of peace would therefore be the substantive laws of the international code: the laws of war would be the adjective laws of the same code."

Bentham enumerates among the causes of war the following:

1. Uncertainty of the right of succession with regard to vacant thrones claimed by two parties.
2. Intestine troubles in neighbouring states, occasioned

by the same cause, or by disputes concerning constitutional law, either between the sovereign and his subjects, or between different members of the sovereign body.

3. Uncertainty as to boundaries.

4. Uncertainty as to the right to new discoveries made by one party or another.

5. Jealousies caused by forced cessions, more or less recent.

6. Disputes, or war, from whatsoever cause they may arise, among circumjacent states.

7. Religious hatred.

As means of prevention, he suggests the following :

1. The codification of unwritten laws which are considered as established by custom.

2. New conventions and international laws to be made upon all points which remain unascertained ; that is to say, upon the greater number of points in which the interests of two states are capable of collision.

3. Perfecting the style of the laws of all kinds, whether internal or international. "How many wars have there been," says he, "which have had for their principal, or even for their only cause, no more noble origin than the ignorance or incompetence of a lawyer or a geometrician."

These means of suppressing the multiplied causes of hostility between nations, growing out of human interests and passions, appear to the author himself so inadequate, that he proposes in his fourth essay a plan for an universal and perpetual peace. This plan is grounded upon two fundamental propositions, both of which he deems indispensable to its success. 1. The reduction and fixation of the forces of the several nations that compose the European system ; 2. The emancipation of the colonial dependencies of each state.

1. In respect to a general disarmament, he observes that, "if the simple relation of any single nation with another be considered, perhaps the matter would not be very difficult. The misfortune is, that almost every where, compound re-

lations are found. On the subject of troops, France says to England, yes I would voluntarily make with you a treaty of disarming, if there were only you ; but it is necessary for me to have troops to defend me from the Austrians. Austria might say the same to France ; but it is necessary to guard against Prussia, Russia, and the Porte. And the like allegation might be made by Prussia with regard to Russia.

“ Whilst as to naval forces, if it concerned Europe only, the difficulty might perhaps not be very considerable. To consider France, Spain and Holland, as making together a counterpoise to the power of Britain,—perhaps on account of the disadvantages which accompany the concert between three separate nations, to say nothing of the tardiness and publicity of procedures under the Dutch constitution,—perhaps England might allow to all together a united force equal to half or more than its own.

“ An agreement of this kind would not be dishonourable. If the covenant were on one side only, it might be so. If it regard both parties together, the reciprocity takes away the acerbity. By the treaty which put an end to the first Punic war, the number of vessels that the Carthaginians might maintain was limited. This condition was it not humiliating ? It might be : but if it were, it must have been because there was nothing correspondent to it on the side of the Romans. A treaty which placed all the security on one side, what cause could it have had for its source ? It could only have had one—that is, the avowed superiority of the party thus incontestably secured. Such a condition could only have been a law dictated by the conqueror to the party conquered : the law of the strongest. None but a conqueror could have dictated it ; none but the conquered would have accepted it.

“ On the contrary, whatsoever nation should get the start of the other in making the proposal to reduce, and fix the amount of its armed force, would crown itself with everlasting honour. The risk would be nothing,—the gain

certain. This gain would be, the giving an incontrovertible demonstration of its own disposition to peace, and of the opposite disposition in the other nation in case of its rejecting the proposal.

“The utmost fairness should be employed. The nation addressed should be invited to consider and point out whatever further securities it deemed necessary, and whatever further concessions it deemed just.

“The proposal should be made in the most public manner :—it should be an address from nation to nation. This, at the same time that it conciliated the confidence of the nation addressed, would make it impracticable for the government of that nation to neglect it, or stave it off by shifts and evasions. It would sound the heart of the nation addressed. It would discover its intentions, and proclaim them to the world.

“The cause of humanity has still another resource, should Britain prove deaf and impracticable, let France, without conditions, emancipate her colonies, and break up her marine. The advantage even upon this plan would be immense, the danger none. The colonies, I have already shown, are a source of expense, not of revenue,—of burthen to the people, not of relief. This appears to be the case, even upon the footing of those expenses which appear upon the face of them to belong to the colonies, and are the only ones that have hitherto been set down to their account. But in fact, the whole expense of the marine belongs also to that account, and no other. What other destination has it? What other can it have? None. Take away the colonies, what use would there be for a single vessel, more than the few necessary in the Mediterranean to curb the pirates.

“In case of a war, where, at present (1789) would England make its first and only attack upon France? In the colonies. What would she propose to herself from success in such an attack? What but the depriving France of her colonies. Were these colonies, these bones of contention,

no longer hers, what then could England do? what could she wish to do?

"There would remain the territory of France; with what view could Britain make any attack upon it in any way? Not with views of permanent conquest; such madness does not belong to our age. Parliament itself, one may venture to affirm, without paying it any very extraordinary compliment, would not wish it. It would not wish it, even could it be accomplished without effort on our part, without resistance on the other. It would not, even though France herself were to solicit it. No parliament would grant a penny for such a purpose. If it did, it would not be a parliament a month. No king would lend his name to such a project. He would be dethroned as surely and as deservedly as James the Second. To say, I will be king of France, would be to say in other words, I will be absolute in England.

"Well, then, no one would dream of conquest. What other purpose could an invasion have? The plunder and destruction of the country. Such baseness is totally repugnant, not only to the spirit of the nation, but to the spirit of the times. Malevolence could be the only motive; rapacity could never counsel it; long before an army could arrive any where, everything capable of being plundered would be carried off. Whatever is portable could be much sooner carried off by the owners, than by any plundering army. No expedition of plunder could ever pay itself."

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b "This brings to recollection the achievements of the war from 1755 to 1763. The struggle betwixt prejudice and humanity, produced in conduct a result truly ridiculous. Prejudice prescribed an attack upon the enemy in his own territory,—humanity forbade the doing him any harm. Not only nothing was gained by these expeditions, but the mischief done to the country invaded was not nearly equal to the expense of the invasion. When a Japanese rips open his own belly, it is in the assurance that his enemy will follow his example. But in this instance, the Englishman ripped open his own belly that the Frenchman might get a scratch. Why was this absurdity acted? Because we were at war; and when nations

"Such is the extreme folly, the madness of war : on no supposition can it be otherwise than mischievous, especially between nations circumstanced as France and England. Though the choice of the events were absolutely at your command, you could not make it of use to you. If unsuccessful, you may be disgraced and ruined : if successful, even to the height of your wishes, you are still but so much the worse. You would still be so much the worse, though it were to cost you nothing. For not even any colony of your own planting, still less a conquest of your own making will so much as pay its own expenses.

"The greatest acquisitions that could be conceived, would not be to be wished for, could they even be attained with the greatest certainty, and without the least expense. In war, we are as likely not to gain, as to gain ;—as likely to lose, as to do either : we can neither attempt the one, nor defend ourselves against the other, without a certain, and most enormous expense.

"Mark well the contrast. All trade is in its essence advantageous, even to that party to whom it is least so. All war is, in its essence, ruinous ; and yet the great employments of government are to treasure up occasions of war, and to put fetters upon trade.

"Ask an Englishman what is the great obstacle to a secure and solid peace, he has his answer ready :—It is the ambition, perhaps he will add, the treachery of France. I wish the chief obstacle to a plan for this purpose were the dispositions and sentiments of France ! were that all, the plan need not long wait for adoption.

"Of this visionary project, the most visionary part is, without question, that for the emancipation of distant dependencies. What will an Englishman say, when he sees two French ministers (Turgot and Vergennes) of the highest

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are at war, something must be done : and there was nothing else to be done. France was already stripped of all its distant dependencies."

reputation, both at the head of their respective departments, both joining in the opinion, that the accomplishment of this event, nay, the speedy accomplishment of it, is inevitable, and one of them scrupling not to pronounce it as eminently desirable.

“It would only be bringing things back on these points to the footing they were on before the discovery of America. Europe had then no colonies ;—no distant garrisons ;—no standing armies. It would have had no wars but for the feudal system,—religious antipathy,—the rage of conquest,—and the uncertainties of succession. Of these four causes the first is happily extinct every where ;—the second and third almost every where ; and at any rate in France and England,—the last might, if not already extinguished, be so with great ease.

“The moral feelings of a man in matters of national morality are still so far short of perfection, that in the scale of estimation, justice has not yet gained the ascendancy over force. Yet this prejudice may, in a certain point of view, by accident, be rather favourable to this proposal than otherwise. Truth, and the object of this essay, bid me to say to my countrymen, it is for you to begin the reformation :—it is you that have been the greatest sinners. But the same considerations also lead me to say to them, you are the strongest among nations : though justice be not on your side, force is ; and it is your force that has been the main cause of your injustice. If the measure of moral approbation had been brought to perfection, such positions would have been far from popular, prudence would have dictated the keeping them out of sight, and the softening them down as much as possible.

“Humiliation would have been the effect produced by them on those to whom they appeared true ;—indignation on those to whom they appeared false. But, as I have observed, men have not yet learned to tune their feelings in unison with the voice of morality in these points. They feel more pride in being accounted strong, than resentment

at being called unjust ; or rather, the imputation of injustice appears flattering rather than otherwise, when coupled with the consideration of its cause. I feel it in my own experience ; but if I, listed as I am as the professed, and hitherto the only advocate in my own country in the cause of justice, set a less value on justice than is its due, what can I expect from the general run of men ?”

He then goes on to propose the establishment of a common court of judicature for the decision of international differences, which could not but facilitate the intended general pacification even if it were not armed with any coercive powers.

“ It is an observation of somebody’s, that no nation ought to yield any evident point of justice to another. This must mean, evident in the eyes of the nation that is to judge, evident in the eyes of the nation called upon to yield. What does this amount to ? That no nation is to give up any thing of what it looks upon as its rights :—no nation is to make any concessions. Wherever there is any difference of opinion between the negociators of the two nations, war is to be the consequence.

“ While there is no common tribunal, something might be said for this. Concession to notorious injustice invites fresh injustice.

“ Establish a common tribunal, the necessity for war no longer follows from difference of opinion. Just or unjust, the decision of the arbiters will save the credit, the honour of the contending party.

“ Can the arrangement proposed be justly styled visionary, when it has been proved of it that

“ 1. It is the interest of the parties concerned.

“ 2. They are already sensible of that interest.

“ 3. The situation it would place them in is no new one, nor any other than the original situation they set out from.

“ Difficult and complicated conventions have been effectuated : for examples, we may mention,



- " 1. The armed neutrality.
- " 2. The American confederation.
- " 3. The German diet.
- " 4. The Swiss league.

" Why should not the European fraternity subsist, as well as the German diet or the Swiss league ? These latter have no ambitious views. Be it so ; but is not this already become the case with the former ?

" How then shall we concentrate the approbation of the people, and obviate their prejudices ?

" One main object of the plan is to effectuate a reduction, and that a mighty one, in the contributions of the people. The amount of the reduction for each nation should be stipulated in the treaty ; and even previous to the signature of it, laws for the purpose might be prepared in each nation, and presented to every other, ready to be enacted, as soon as the treaty should be ratified in each state.

" By these means the mass of people, the part most exposed to be led away by prejudices, would not be sooner apprized of the measure, than they would feel the relief it brought them. They would see it was for their advantage it was calculated, and that it could not be calculated for any other purpose.

" The concurrence of all the maritime powers, except England, upon a former occasion, proved two points : the reasonableness of that measure itself, and the weakness of France in comparison with England. It was a measure not of ambition, but of justice : a law made in favour of equality :—a law made for the benefit of the weak. No sinister point was gained, or attempted to be gained by it. France was satisfied with it. Why ? because she was weaker than Britain, she could have no other motive : on no other supposition could it have been of any advantage to her. Britain was vexed by it. Why ? For the opposite reason : she could have no other.

" Jealousy is the vice of narrow minds ; confidence the virtue of enlarged ones. To be satisfied that confidence

between nations is not out of nature where they have worthy ministers, one need but read the account of the negotiation between De Witt and Temple, as given by Hume. I say, by Hume :—for as it requires negotiators like De Witt and Temple to carry on such a negotiation in such a manner, so it required a historian like Hume to do it justice. For the vulgar among historians know no other receipt for writing that part of history than the finding out whatever are the vilest and basest motives capable of accounting for men's conduct in the situation in question, and then ascribing it to those motives without ceremony and without proof.

“ Temple and De Witt whose confidence in each other was so exemplary and so just :—Temple and De Witt were two of the wisest as well as most honourable men in Europe. The age which produced such virtue, was, however, the age of the pretended popish plot, and of a thousand other enormities which cannot now be thought of without horror. Since then, the world has had upwards of a century to improve itself in experience, in reflection, in virtue. In every other line its improvements have been immense and unquestioned. Is it too much to hope that France and England might produce not a Temple and a De Witt ;—virtue so transcendant as theirs would not be necessary ;—but men who, in happier times, might achieve a work like theirs with less extent of virtue.

“ Such a congress or diet might be constituted by each power sending two deputies to the place of meeting ; one of these to be the principal, the other to act as an occasional substitute.

“ The proceedings of such congress or diet should be all public.

“ Its power would consist, 1. In reporting its opinion.

“ 2. In causing that opinion to be circulated in the dominions of each state.

“ Manifestoes are in common usage. A manifesto is designed to be read either by the subjects of the state com-

plained of, or by other states, or by both. It is an appeal to them. It calls for their opinion. The difference is, that in that case nothing of proof is given ; no opinion regularly made known.

“ The example of Sweden is alone sufficient to show the influence which treaties, the acts of nations, may be expected to have over the subjects of the several nations, and how far the expedient in question deserves the character of a weak one, or the proposal for employing and trusting to it, that of a visionary proposal.

“ The war commenced by the king of Sweden against Russia, was deemed by his subjects, or at least a considerable part of them, offensive, and as such, contrary to the constitution established by him with the concurrence of the states. Hence a considerable part of the army threw up their commissions or refused to act ; and the consequence was, the king was obliged to retreat from the Russian frontier and call a diet.

“ This was under a government, commonly, though not truly, supposed to be changed from a limited monarchy, or rather aristocracy, to a despotic monarchy. There was no act of any recognized and respected tribunal to guide and fix the opinion of the people. The only document they had to judge from was a manifesto of the enemy, couched in terms such as resentment would naturally dictate, and therefore none of the most conciliating ;—a document which had no claim to be circulated, and of which the circulation, we may be pretty well assured, was prevented as much as it was in the power of the utmost vigilance of the government to prevent it.

“ After a certain time, in putting the refractory state under the ban of Europe.

“ There might, perhaps, be no harm in regulating as a last resource, the contingent to be furnished by the several states for enforcing the decrees of the court. But the necessity for the employment of this resource would, in all human probability, be superseded for ever by having re-

course to the much more simple and less burthensome expedient of introducing into the instrument by which such court was instituted, a clause guarantying the liberty of the press in each state, in such sort, that the diet might find no obstacle to its giving, in every state, to its decrees, and to every paper whatever which it might think proper to sanction with its signature, the most extensive and unlimited circulation."<sup>c</sup>

There is a striking resemblance between these "*rêves d'un homme de bien*," and the projects of perpetual peace suggested by Saint Pierre and Rousseau.<sup>d</sup> This proposition of Bentham to abolish war forever between the nations of Europe, is the more remarkable as it was prepared just before the breaking out of a war, the most destructive in its consequences, and attended with the most flagrant violations of the positive law of nations of any which has occurred in modern times. The only guarantee which he proposes for the preservation of perpetual peace is the formation of a general league of European states, the laws of which were to be enacted by a common legislature and carried into effect by a common judicature, but without providing any means for preventing this league from falling under the exclusive influence and control of its more powerful members. Experience has sufficiently demonstrated the difficulty of reconciling such corporate alliances with the rights and independence of each separate nation, and especially those of states of the second order. The right of perpetual supervision and interference, which these alliances involve as a necessary means of effecting their object, has been hitherto found too liable to abuse to warrant its being incorporated without danger into the international code. The cases where such interference has been allowed in or-

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<sup>c</sup> Works of Jeremy Bentham now first collected under the superintendence of his executor, John Bowring, Part 8, pp. 537-554, London, 1839.

<sup>d</sup> See Part Second, § 17.

der to preserve the peace of Europe constitute exceptions to a general rule of the most sacred and salutary nature, that by which the independence even of the smallest state ought to be respected by the greatest, as essential to the general security of all and to the maintenance of the balance of power on which that security depends.

# HISTORY

## OF THE

### MODERN LAW OF NATIONS.

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#### PART FOURTH.

HISTORY OF THE LAW OF NATIONS IN EUROPE AND  
AMERICA, FROM THE FRENCH REVOLUTION, 1789, TO  
THE TREATY OF WASHINGTON, 1842.

THE first war of the French revolution originated in the application by the allied powers of the principle of armed intervention to the internal affairs of France for the purpose of checking the progress of her revolutionary principles and the extension of her military power. That this was the avowed motive of the powers allied in the continental war of 1792 will be apparent from an examination of historical documents, and as such this example furnishes a strong admonition against attempting to incorporate into the international code a principle so indefinite and so peculiarly liable to abuse in its practical application. The previous history of Europe had furnished numerous cases of intervention by European states in the affairs of each other, where the interests and security of the intervening powers were supposed to be immediately affected by the transactions of other nations. Such were the interventions of the Catholic and Protestant powers in favour of the adherents of their religious faith during the wars growing out of the

§ 1. Application of the principles of intervention in the War of the French revolution.

Reformation, and the various confederacies formed to check the undue aggrandizement, first of the house of Austria and subsequently of the house of Bourbon, threatening the general security by disturbing the balance of European power. But the wars of the French revolution involved, in the opinion of the allied powers and those public jurists by whom their cause was supported, both imminent danger to the social order of Europe by the propagation of the revolutionary principles of France, and to the balance of power by the undue extension of her dominion.

§ 2. Origin of  
the War in  
1792.

The National Assembly had included in the general abolition of feudal tenures and tythes, the possessions of the German lay and ecclesiastical princes in the province of Alsace, of which the sovereignty was ceded to France by the treaty of Westphalia, with a reservation of the rights of private property and jurisdiction. Complaints were made to the French government on the part of the states of the empire, and a decree of the National Assembly was passed, on the 28th October, 1790, authorizing the king to negotiate for a pecuniary indemnity to the claimants. This offer being refused, the matter was brought by the Emperor Leopold II before the diet; which pronounced its *conclusum* on the 10th December, 1791, by which the Emperor was invited to maintain the rights and possessions of the states of the empire against the usurpations of France; the claimants were declared entitled to the aid of the empire; the protection of the powers guarantees of the peace of Westphalia was invoked, and an armament decreed. This *conclusum* was ratified by the Emperor, who again applied for redress in a letter dated the 3d December, 1791, and addressed to Louis XVI. The reply of the king of the French dated the 15th February, 1792, renewed the previous offer to treat on the basis of a pecuniary indemnity, and declined the demand of the re-establishment of the *status quo* as incompatible with the French constitution; but proposed to extend the indemnity to the arrearages of revenues, due to the German princes, since the decree of

the 4th August, 1789, for abolishing the feudal tenures. Several German princes availed themselves of this offer but the conventions concluded with them were superseded by subsequent events.\*

It is not probable that this question would have become the occasion of war had it not been connected with other incidents of more importance.

The French princes, and other emigrants, who had found a refuge in the ecclesiastical electorates of the Rhine, assembled in arms, with the intention of invading France. The Count d' Artois had a conference with the Emperor Leopold at Mantua on the 20th May, 1791, and received assurances of co-operation on the part of Austria and the empire. It is even said that a formal treaty of alliance was signed at Pavia on the 6th July, between Austria, Prussia and Spain for the partition of the frontier provinces of France. It is doubtful whether this treaty ever existed ; but what is not doubtful, is that Leopold II addressed, on the same day, a circular to the principal European powers, by which he invited them to declare to the French nation, that the sovereigns considered the cause of his most christian majesty as their own ; that they required that this monarch, and his family, should be immediately set at liberty, and authorized to proceed wherever they chose ; that their persons should be treated with the respect due from subjects to their sovereigns ; that the powers would unite to avenge any further offences against the liberty, the honour, and safety of the king and his family ; that they would consider as constitutional laws only those to which the king should have given his free assent ; finally, that they would employ every means of terminating

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\* Schoel, *Histoire des Traités de Paix*, tom. iv. pp. 172-180. It is remarkable that in his correspondence with Louis XVI, which was in Latin, the Emperor complains that the letters of the former were written in the French language, contrary to the former usage, which required that all affairs between the Empire and France should be treated of in Latin.



the scandal of a usurpation founded on rebellion, and of which the example was dangerous to every government.<sup>b</sup>]

That no such formal treaty as that supposed was signed at Pavia, appears evident from the contents of a convention, known to have been signed at Vienna, on the 25th July, between Austria and Prussia; by which it was stipulated that a treaty of defensive alliance should be concluded between them as soon as peace was concluded between Russia and the Porte, to which proposed alliance the Empress of Russia and the two maritime powers, Great Britain and Holland, should be invited to accede.<sup>c</sup>

A month after the signature of these preliminaries, the Emperor, the King of Prussia, and the Elector of Saxony, held the famous conference of Pilnitz, at which the Count d'Artois and several leading French emigrants assisted. On the 27th of August, the two first named sovereigns signed a joint declaration, stating, in rather vague and general terms, that they considered the situation of the French monarch as an object of common interest to all the sovereigns of Europe; and expressing the hope that this interest would not fail to be recognized by the powers whose aid had been demanded; and that they would, consequently, not refuse to employ, jointly with their said majesties, the most efficacious means to put the King of France in a state to enable him, with perfect freedom, to lay the foundations of a monarchical government, equally consistent with the rights of sovereigns and the welfare of the French nation; in which case, the Emperor and the King of Prussia were resolved, to act promptly, and with necessary forces, to obtain the proposed common object.] In the mean time, they would give the necessary orders to hold their troops in readiness to take the field.

To this declaration are said to have been annexed six se-

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<sup>b</sup> Schoel, tom. iv. p. 185.

<sup>c</sup> Martens, nouveau recueil, tom. v. p. 236.

cret articles, by which the contracting parties stipulated to concert the necessary measures for the maintenance of the treaties subsisting with France, and for the representations to be made to the French nation, in which they were to invite the whole empire to concur.<sup>d</sup>

The proposed alliance was at last definitively signed at Berlin on the 7th of February, 1792, between Austria and Prussia, mutually guarantying their respective possessions, stipulating mutual succours of men and money, and declaring the maintenance of the Germanic constitution to be the principal object of the alliance.\*

In the mean time, Louis XVI had accepted the new French constitution, on the 14th September, 1791, and declared to foreign powers his intention of supporting it. Leopold II wrote, on the 21st November, to all the courts to whom his circular from Pavia had been directed, as well as to Sweden, Denmark, Holland, and Portugal, that the King of France might now be considered as free, and his acceptance of the constitution as valid; expressing the hope that this acceptance would re-establish tranquility in France; that prudence, however, required that the measures concerted should not be renounced, but that he deemed it necessary that the powers should declare by their ministers at Paris that the league still subsisted, and that the allied sovereigns were ready, in case of necessity, to sustain the sacred rights of the King and of the French monarchy.

The pacific views of Leopold were not participated by all the powers. Gustavus III of Sweden had, from the origin of the revolution, declared himself the champion of the rights of sovereigns, and aspired to the honor of commanding the combined forces destined to restore the French monarchy. He concluded an alliance with Catharine II at Drottingholm, on the 19th October, 1791, the secret ar-

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<sup>d</sup> Martens, nouveau recueil, tom. v. pp. 260-261.

\* Martens, tom. v. p. 301.

ticles of which have never been published, but which doubtless related to the affairs of France. These two northern powers refused to receive the notification of Louis XVI having accepted the constitution, declaring that they could not consider the King as free. The policy of Leopold was to prolong the negotiations, to watch the progress of the revolutionary movements in France, and to submit the affairs of that country to the decision of an European congress, through which he hoped to obtain a modification in the French constitution by the establishment of two legislative chambers. The National Assembly met this expedient by a decree, declaring traitors to their country all Frenchmen, who should consent to submit the independence of their country to the decision of a foreign congress.

It is impossible to determine what might have been the effect of this violent decree on the conduct of Leopold, who died on the 1st of March. His son and successor Francis II immediately ratified the treaty of alliance with Prussia of the 7th February, and declared to the French government that he would not desist from his engagements with his allies until France should remove the causes which had rendered them necessary. Frederick William II considered war as inevitable, and deceived by the examples of the success of the armed intervention of the Triple Alliance in the internal affairs of Holland and Belgium, flattered himself with the hope of arresting the progress of the French revolution by the force of arms. In the mean time the war party in France had gained the ascendancy by the accession to the ministry of Dumouriez and the Girondins. The negotiations continued to turn upon the demand of France that the emigrants in the ecclesiastical electorates should be disarmed and dispersed, which it was alleged on one side had been already accomplished, whilst the fact was denied on the other. All uncertainty as to the question of peace or war finally terminated by the Austrian ultimatum of the 7th April, requiring the re-establishment of the French monarchy upon the basis of the royal declaration of

the 23d June, 1789 ; the restoration of the Comtat Venaisin to the Pope ; and the re-establishment of the princes of the empire in their possessions in Alsace with the former feudal privileges. Armed with this document, the French ministry advised the King to propose to the national assembly, according to the forms of the constitution, a decree declaring that France *was in a state of war* with the King of Hungary and Bohemia.<sup>f</sup> Louis XVI, reluctantly consented to this proposition, and the decree was accordingly passed by an immense majority on the 20th April.<sup>g</sup>

In the *Exposition des Motifs* drawn up on this occasion by Condorcet, the national assembly endeavoured to repel the imputation, which it anticipated would be directed against its conduct, as having accelerated and provoked the war thus declared to exist. This paper lays down the principle, that every nation has the exclusive right of making and changing its own laws. This right, if it belongs to one, must belong to all, to attempt to restrain its exercise to a single state, is to deny it universally. The French nation had fondly believed that these simple truths would be acknowledged by every prince, and that in the eighteenth century the antiquated maxims of tyranny would not be cited against them. This hope had been disappointed ; a league had been formed against their independence, leaving them no other alternative but to convince their enemies of the justice of their cause, or to support it by the force of arms.

The object of this concert between powers, so long rivals had been declared to be the maintenance of the general tranquility, the safety and honour of crowns, and the fear of seeing a repetition of the same scenes which had marked certain epochs of the French revolution.

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<sup>f</sup> Francis I, had not yet been elected emperor.

<sup>g</sup> Segur, *Histoire de F. Guillaume II*, tom. ii. pp. 216-233. Mignet, *Histoire de la Révolution Française*, ch. 5. Thiers, tom. ii, pp. 41-76.

But, it was asked, how could it be said that France had threatened the general tranquility when she had solemnly renounced all designs of conquest, and had remained neutral in the midst of the internal dissensions of Belgium and Liege? The French nation had indeed proclaimed that sovereignty belongs exclusively to the people, whose right to delegate power is limited by the rights of posterity; that no usage, no law, no consent, no convention could irrevocably bind a society of men to any human authority. But the enunciation of these maxims could not be considered as disturbing the tranquility of other states; and to require the suppression of the writings in which they were propagated was to demand a law against the liberty of the press, and to declare war against the progress of human reason. As to the pretended attempts of Frenchmen to excite other nations to insurrection, no proof had been offered in support of the allegation: and even supposing it to be true, those powers would have no right to complain, who had suffered the assemblage of the emigrants, who had given them aid and succour, who had publicly received their ambassadors, and who had endeavoured to excite civil war among the French; unless indeed it be lawful to extend servitude, and unlawful to propagate liberty; unless every thing be permitted against the people, and kings alone have rights.

If violence and crimes had marked some of the epochs of the French revolution, the power of punishing, or of casting over them the veil of oblivion, belonged exclusively to the depositaries of the national authority: every citizen, every magistrate, whatever might be his title, has a right to seek for justice from the laws of his country alone. Foreign powers, so long as their subjects had not suffered from these events, could have no just motive either to complain, or to take hostile measures to prevent their recurrence. The relationship between kings, their personal alliances, are indifferent to nations, whether free or slaves: nature had made their happiness to consist in peace, and in mutual aid as brethren; and they would see with indignation the fate of

twenty millions of men placed in the same scale with the affections and pride of a few individuals.

As to the claims of the German princes in Alsace, and of the Pope in the Comtat, it was answered that the sovereignty over the former province had been transferred to France, with the reservation of certain rights, which were but privileges. The true sense of this reservation was that these privileges should be preserved, so long as the general laws of France recognized the feudal system in its various forms, and that when abolished, the nation owed an indemnity to the former possessors for the real losses they had sustained. This was all that a regard to the rights of property could require, when opposed to the law and to the public interest.

The citizens of Alsace were Frenchmen, and the nation could not, without injustice, suffer them to be deprived of the smallest portion of the rights common to all those whom this character ought to protect. The citizens of the Comtat, who might have declared themselves independent, have preferred to be French, and France will not abandon those whom she has adopted.

It had been pretended that the wish of the French nation for the preservation of its equality and independence was that of a faction. But that nation had a constitution; this constitution had been adopted by the great mass of the people: so long as it subsisted, the authorities established by it have the exclusive right of manifesting the national will, and it was by them that this will had been announced to foreign nations. It was the King who, on the invitation of the national assembly, and fulfilling the functions attributed to him by the constitution, had complained of the protection given to the emigrants; who had demanded explanations respecting the league formed against France; who had required that the league should be dissolved; and yet the solemn will of the people, thus publicly expressed by its lawful representative, had been considered as the voice of an inconsiderable faction.

The continuance of the hostile protection given to the

emigrants, the open violation of the promise to disperse them, the refusal to renounce an offensive league, the exceptionable motives of that refusal, announcing the desire of destroying the French constitution, furnished sufficient reasons to authorize hostilities, which must be considered as defensive ; since it was not an act of aggression to refuse to permit our avowed enemy to choose his own time and manner of attack. The national assembly had shown its desire of avoiding war, by every means consistent with the maintenance of the constitution, the independence of the national sovereignty, and the safety of the state. The ultimatum of Austria offered no other alternative than the re-establishment of the feudal servitude and its humiliating inequality, bankruptcy, and the payment of taxes by the people alone, the restoration of the national domains to their former owners, and the blood of the nation to be lavished in supporting the designs of an enemy house.<sup>1</sup>

The King of Prussia published on the 26th of June, an exposition of the motives which had induced him to take up arms against France. These were stated to be the violation of the treaties between the empire and France in the suppression of the rights and possessions of the German princes in Alsace ; the propagation in other countries of those principles subversive of social order which had thrown France into a state of confusion ; the toleration, encouragement, and even official publication of discourses and writings, the most offensive against the sacred persons and lawful authority of sovereigns ; and finally the unjust declaration of war against the King of Hungary and Bohemia, followed by the actual invasion of the Belgic provinces of that monarch, included in the German empire, as a part of the circle of Burgundy, and the occupation of the territory of Bâle forming incontestably a portion of that empire. His Prussian

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<sup>1</sup> Thiers, *Histoire de la Révolution Française*, tom. ii. pp. 311-320. Notes et pièces justificatives.

majesty took up arms, not only in defence of his ally, his apostolic majesty, and of the empire, unjustly attacked by the rulers of France ; but to prevent the incalculable evils which might result to France, to Europe, and to humanity in general, from the fatal spirit of insubordination, licentiousness, and anarchy, the progress of which ought already to have been arrested by unhappy and dear bought experience. No state interested in maintaining the balance of power in Europe could see with indifference the kingdom of France, which formerly formed so considerable a weight in that balance, longer abandoned to internal agitations, and the horrors of anarchy, which had, so to speak, destroyed its political existence. There was no Frenchman, who sincerely loved his country, who must not ardently desire to see them terminated ; no man, the sincere friend of humanity, who would not desire to see checked this phantom of false liberty, which had led the people astray from the path of true happiness, by weakening the ties of attachment and confidence which should unite them to princes, their strength and their defence ; and this phrenzy of evil disposed men, who sought to destroy the respect due to governments, in order to erect upon the ruins of thrones the idols of their insatiable ambition and vile cupidity. To suppress anarchy in France ; to re-establish, for this purpose, a lawful power on the essential basis of a monarchical form ; and, by these means, to secure other governments against the criminal and incendiary efforts of a band of mad-men :—such was the great object of the king and his ally, certain in this enterprize of receiving the approbation of all the powers of Europe, who could not fail to acknowledge its justice and necessity, but also the good wishes of all who sincerely interested themselves in the happiness of mankind.<sup>1</sup>

We have already seen that the object of the continental

§ 3. Object

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<sup>1</sup> *Motifs du Roi de Prusse pour prendre les armes contre la France. Sec-  
gur, Histoire de F. Guillaume II, tom. ii. p. 355. Pieces justificatives.*



of the war on  
the part of G  
Britain.

alliance against France was the restoration of the ancient order of things in that country. It was an armed intervention against the principles of the French revolution, deemed to be of dangerous example and contagious influence on the neighboring monarchies. But that revolution, so far as it aimed merely at a reform of the internal government of France, could not justly be considered as obnoxious to a country whose constitution was founded upon the national will expressed by the expulsion of one race of kings and the substitution of another with more limited or defined prerogatives. Even the British minister who subsequently devoted his life and all the resources of his country to waging a war of extermination against the French revolution did not, at first, view with any feeling of jealousy the prospect that its termination in a system of "freedom rightly understood, freedom resulting from good order and good government, might contribute to render France more formidable, since she would enjoy that just kind of liberty which he venerated, and which it was his duty as an Englishman peculiarly to cherish."<sup>k</sup> And the statesman who had sounded the trumpet of alarm against that revolution, as menacing with destruction the social and political order of Europe, saw in it the total destruction of the external power of France. In his speech on the same occasion, Mr. Burke stated, that France was, at that time, to be considered as expunged from the system of Europe. Whether she could ever appear in it again as a leading power, was not easy to determine : but at present he considered France as not politically existing ; and most assuredly it would take much time to restore her to her former active existence. *Gallos quoque in bellos floruisse audivimus*, might possibly be the language of the rising generation. He did not mean to deny that it was their duty to keep their eye on that nation, and to regulate their preparation by the symptoms of

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<sup>k</sup> Mr. Pitt's Speech in the House of Commons, 9th Feb. 1790.

her recovery. That it was to her *strength*, not to her *form of government*, that they were to attend ; because republics, as well as monarchies were susceptible of ambition, jealousy, and anger, the usual causes of war. But if while France continued in this swoon, they should go on increasing their expenses, they would certainly make less a match for her, when it became their concern themselves to arm. It was said, that as she had speedily fallen, she might speedily rise again. He doubted this. That the fall from an height was with an accelerated velocity ; but that to lift a weight up to that height again was difficult, and opposed by the laws of physical and political gravitation.<sup>1</sup>

The causes which induced the British government to depart from that system of neutrality it had adopted in the war of principles, produced on the continent by the events of the French revolution, will be best explained by a reference to the diplomatic correspondence and parliamentary debates of the eventful year 1792.

The mission of M. Chauvelin, the first ambassador from France to England, under the new constitution, commenced in the spring of that year. The object of his first note addressed to Lord Grenville on the 12th May, was to explain to the British court the reasons which had determined the King of the French to declare war against Francis II. It stated that a great conspiracy had been formed in Europe against France, to destroy her new constitution, which the King had accepted and sworn to maintain ; masking, for a season, the preparations of its designs by an insulting pity for his person, and a pretended zeal for his authority. It set forth the remonstrances which the King had made upon the subject of this coalition, first to the Emperor Leopold II, and then to his successor, Francis II. It stated, that it had at last been declared, on the part of the latter, that, " this coalition could not cease until France should remove the

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<sup>1</sup> Burke's Works, vol. iii. p. 4, quarto edit.

serious causes which had given rise to it ;” that is to say, so long as France jealous of her independence, would not give up the smallest point of her new constitution. The note added that this declaration had been accompanied with the assembling of troops upon all the frontiers of France, evidently for the purpose of constraining her inhabitants to alter the form of government which they had freely chosen and sworn to defend.

Having thus stated the alleged causes of the war with the Emperor, the note went on to disclaim on the part of France all idea of aggrandizement, the sole objects of the war on her part, being the preservation of her existing limits, of her freedom, her constitution, and her right of reforming her own internal institutions, without admitting the interference of foreign powers. That she never would consent that they should attempt to dictate, or even dare to nourish the hopes of dictating laws to her. But that this very pride, so natural, and so just, was a sure pledge to all the powers from whom she should receive no provocation, not only of her constant pacific disposition, but, also of the respect which France would show at all times for the laws, the customs, and the forms of government of different nations. The note further declared, that the King of the French desired to have it known, that he would publicly and severely disavow all agents at foreign courts in amity with France, who should dare to depart an instant, from that respect, either by fomenting, or favouring insurrection against the established order, or by interfering, in any manner whatever, in the interior policy of such states, under pretence of a proselytism, which, exercised in the dominions of friendly powers, would be a real violation of the law of nations.

On the 24th May, Lord Grenville returned an answer to M. Chauvelin’s note, expressing the regret of the British government at the war which had broken out between France and Austria, but declining to enter into a discussion of the motives and the steps on each side which pro-

duced the rupture ; at the same time declaring, that " His Britannic majesty would pay the strictest attention to the preservation of the good understanding which so happily subsisted between him and his most Christian majesty ; expecting with confidence, that the latter would contribute to the same end by causing the rights of his Britannic majesty and his allies to be respected, and by rigorously forbidding any step which might affect the friendship which his majesty had ever desired to consolidate and perpetuate for the happiness of the two empires."<sup>m</sup>

During the interval between these two notes, the British government had issued, on the 21st of May, a proclamation against seditious publications, having for their objects the exciting of discontents in the minds of its subjects, respecting the laws and constitution of government, established in the kingdom, and against the correspondence entered into with sundry persons in foreign parts, with a view to forward the criminal purposes of these publications. This proclamation took no direct notice of France, and being an act of internal police, France had in strictness, no right to complain of it. But the period of its issuing, being so critical, induced M. Chauvelin to repeat to Lord Grenville, in a note dated on the 24th May, the same declarations contained in his first note of the 15th, with this addition, that, " if certain individuals of this country, have established a correspondence abroad tending to excite troubles therein ; and if, as the proclamation seems to insinuate, certain Frenchmen have come into their views, that is a proceeding wholly foreign to the French nation, to the legislative body, to the king, and to his ministers ; it is a proceeding of which they are entirely ignorant, which militates against every principle of justice, and which, whenever it became known, would be universally condemned in France."

On the 18th of June, when the vast confederacy of the

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<sup>m</sup> Parliamentary History of England, vol. xxx. p. 239.

continent was more visibly extending itself against France, M. Chauvelin demanded the mediation of the British government, between the allies and France. This mediation was declined by Lord Grenville, in a note dated the 9th of July, upon the ground that the same sentiments which had determined his majesty not to take a part in the internal affairs of France, ought equally to induce him to respect the rights, and the independence of other sovereigns, and especially those of his allies; and his majesty had thought that, in the existing circumstances of the war now begun, the intervention of his councils, or of his good offices, could not be of use, unless they should be desired by all the parties interested.<sup>a</sup>

In the mean time the exercise of the executive power had been withdrawn from Louis XVI, in consequence of the events of the 10th August; and the British minister, Lord Gower, was ordered by his government to leave Paris, and before his departure to take every opportunity of expressing, that whilst his majesty intended to adhere strictly to the principles of neutrality, in respect to the settlement of the internal government of France, he, at the same time considered it as no deviation from those principles to manifest, by all the means in his power, his solicitude for the personal situation of their most Christian majesties, and their royal family; and he earnestly and anxiously hoped that they would, at least, be secure from any acts of violence, which could not fail to produce one universal sentiment of indignation through every country of Europe.

The establishment of the republic followed, and though M. Chauvelin was refused to be recognized as its minister, yet the correspondence between him and Lord Grenville still continued in an unofficial form. It results from this correspondence, that the charges made by Great Britain against France, were principally these :

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<sup>a</sup> Parliamentary History of England, vol. xxx. p 349.

1. A meditated attack upon Holland, and at all events a violation of her rights, notwithstanding her neutrality, by the proceedings of the national convention respecting the navigation of the river Scheldt, and the opening a passage through it to attack the citadel of Antwerp.

2. The French invasion and possession of the Netherlands.

3. The encouragement given to revolt in other countries, not only by emissaries sent to England, but by the decree promulgated by the convention on the 19th of November, which it was *alleged* contained a formal declaration of a design to extend universally the new principles of government adopted in France, and to encourage revolt in all countries, even those which were neutral.\*

On the 13th of January, 1793, M. Chauvelin communicated to Lord Grenville a paper signed by M. Le Brun, minister of foreign affairs of the republic, in which these charges were answered substantially as follows. As to the opening of the Scheldt, it was declared to be a question absolutely indifferent to England, of little importance to Holland, but extremely important to the Belgians. France had declared herself ready to support the latter in the exercise of the free navigation of that river. Public law ought to be nothing but the application of the principles of the rights of nations to the particular circumstances in which they are placed with regard to each other, so that every particular treaty repugnant to such principles could only be regarded as the work of violence. The treaty re-

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\* This decree was in the following terms:

"La convention nationale déclare qu'elle accordera secours et fraternité à tous les peuples qui voudront recouvrer leur liberté, et elle charge le pouvoir exécutif de donner des ordres aux généraux des armées Françaises pour secourir les citoyens qui auraient été ou qui seraient vexés pour la cause de la liberté.

"La convention nationale ordonne aux généraux des armées Françaises de faire imprimer et afficher le présent décret dans tous les lieux où ils porteront les armes de la république."

lating to the Scheldt was concluded without the participation of the Belgians. The Emperor, to secure the possession of the Low Countries, sacrificed, without scruple, the most inviolable of rights. France engaged in war with the house of Austria, expelled it from the Low Countries, and called back to freedom those people whom the court of Vienna had devoted to slavery. The consequence was that the Belgians reëntered into all the rights which Austria had taken away from them. The executive council of the republic at the same time declared that France had renounced every conquest; and her occupation of the Low Countries should only continue during the war, and the time which might be necessary to insure and consolidate the liberty of the Belgians. After which, let them be independent and happy, France would find her recompense in their felicity. When these objects should be accomplished, if England and Holland should still attach any importance to the opening of the Scheldt, it might become the object of a direct negotiation with Belgium. If the Belgians consented to deprive themselves of the free navigation of that river, France would not oppose it: she would know how to respect their independence even in their errors.

As to the decree of the 19th November, 1792, it declared that it was inapplicable unless to the single case, in which the general will of a nation, clearly and unequivocally expressed, should call the French nation to its assistance. Sedition could certainly never be construed into the general will. The two ideas mutually repelled each other, since a sedition could only be the movement of a small number against the nation at large; and this movement would cease to be seditious when all the members of a society should at once rise, either to reform their government, or to change its form *in toto*, or for any other object. The Dutch assuredly were not seditious, when they formed the generous resolution of shaking off the yoke of Spain, and when the general will of that nation called for the assistance of

of other powers, it was not reputed a crime in Henry IV, or Elizabeth of England to have listened to them.

On the 18th of January, Lord Grenville returned an answer to M. Chauvelin, declaring that these explanations were unsatisfactory; that the claim was still reserved by France of a right to annul treaties, and to violate the rights of the allies of Great Britain; there being only offered on this subject an illusory negotiation, which was referred, as well as the evacuation of the Low Countries by the French armies, to the indefinite period, not only of the conclusion of the war, but also of the consolidation of what was called the liberty of the Belgic people.\*

On the 24th of January, M. Chauvelin received orders, in consequence of the death of Louis XVI, to leave the kingdom.

On the 28th January, these papers were communicated to the British parliament, with a royal message calling for an augmentation of the forces. In the debate which took place in the house of commons upon this message, on the 1st of February, Mr. Pitt declared that since the commencement of the war between France and the continental powers, Great Britain had maintained a strict neutrality; but that France had falsified her assurances, disclaiming all projects of external aggrandizement, and all intention of interfering in the internal affairs of other countries. She had conquered Savoy and annexed it to France, and shown an evident disposition to annex Belgium to her territory. She still persisted in her intention of opening the Scheldt, although she was bound by the faith of solemn and recent treaties to secure to the Dutch the exclusive navigation of that river. Even if France were the sovereign of the Low Countries, she could only succeed to the rights which were enjoyed by the house of Austria, and if she possessed the sovereignty with all its advantages, she must also take it

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\* Parliamentary History of England, vol. xxx. pp. 262-266.



with all its incumbrances ; of which the shutting up of the Scheldt was one—France could have no right to annul the stipulations relative to the Scheldt, unless she had also the right to set aside all the other treaties between all the powers of Europe. England would never consent that France should arrogate the power of annulling at her pleasure, and under the pretext of a natural right, of which she makes herself the only judge, the political system of Europe, established by solemn treaties, and guaranteed by the consent of all the powers, herself included. If no formal requisition had been made by Holland for the support of Great Britain, the former power might have been influenced by motives of policy, arising from fear of the progress of the French arms ; but that was no reason why the British government should suffer the ancient treaties of their ally to be trampled on by France.

In his reply, Mr. Fox adverted to the three grounds of war alleged by ministers against France, viz., the danger of Holland ; the decree of the national convention of November 19th ; and the general danger to Europe from the progress of the French arms. As to the opening of the Scheldt, Great Britain was only bound by virtue of the treaty, to guaranty the rights of Holland when called upon by that power. He considered the explanations of the executive council of the decree of the 19th November as inadequate ; but then they were entitled to be told what explanation would be accepted by Great Britain as an adequate satisfaction. Nor was the assurance given by France that she would evacuate Belgium at the close of the war, or when the liberties of that country were firmly established, sufficient security ; but then she ought to be told what assurance on this head would be satisfactory, since that war, was clearly unjust which did not announce to the enemy the measure of atonement which would be sufficient to avert it. The general security of Europe would be better promoted by proposing terms before going to war, than by leaving it to the uncertain issue of arms. He had thus

shown that none of the professed grounds were grounds for going to war. What then remained but the internal government of France, always disavowed, but ever kept in mind, and constantly mentioned? The destruction of that government was the avowed object of the combined powers, whom it was hoped the British nation were to join; and they could not join them heartily, if the object of those powers was one thing, whilst that of the British government was another. Such would be the real cause of the war, if war they were to have. He thought the then present state of government in France any thing rather than an object of imitation; but he maintained, as an inviolable principle, that the government of every independent state was to be settled by those who were to live under it, and not by foreign force. The conduct of the French in the Netherlands was the same with such a war as he was then deprecating. It was the tyranny of giving liberty by compulsion;—it was an attempt to introduce a system among a people by force, which the more it was forced upon them, the more they abhorred it.<sup>4</sup>

On the same day that this debate took place, war was declared by France against Great Britain and Holland, upon the ground that the former had refused to acknowledge the French republic, had broken the treaty of commerce between the two countries, and had armed with the avowed intention of making war upon France in conjunction with the continental coalition.

The war thus commenced was continued with various success on both sides, but without any more precise definition of its objects on the part of the British government, until the debate upon Mr. Fox's motion for peace on the 17th June, 1793, when Mr. Pitt declared that there was no intention, if the country had not been attacked, to interfere in the internal affairs of France. This was clearly proved

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<sup>4</sup> Parliamentary History of England, vol. xxx. pp. 270–315.

by the system of neutrality so strictly observed on its part. But having been attacked, there was nothing in the addresses of parliament to the king, or in the declarations of his ministers, which pledged them not to take advantage of any interference in the internal affairs of France that might be necessary. He did not mean to say, that if without any interference, sufficient security and reparation could be had for Great Britain, he would not, in that case, be of opinion that they ought to abstain from all interference, and allow the French government to remain even upon its then present footing. But he considered the question of obtaining that security, while the same principles that then prevailed continued to actuate that government, to be extremely difficult, if not impossible. He should certainly think that the best security, they could obtain, would be in the end of that wild ungoverned system, from which had resulted those injuries, against which it was necessary to guard. There were, however, degrees and proportions of security which might be obtained, and with these they ought to rest satisfied; these must depend upon the circumstances that should afterwards arise, and could not be ascertained by any previous definition. But when they had seen themselves and all Europe attacked; when they had seen a system established violating all treaties, disregarding all obligations, and, under the name of the rights of man, uniting the principles of usurpation abroad with tyranny and confusion at home; they would judge, whether they ought to sit down without some security against the consequences of such a system being again brought into action. This security, it appeared to him, could only be obtained in one of three modes; 1st. That these principles should no longer predominate; or, 2dly, That those, who were then engaged in them, should be taught that they were impracticable, and convinced of their own want of power to carry them into execution; or 3dly, That the issue of the war should be such as by weakening their power of attack should strengthen the British power of resistance. With-

out these, they might indeed have an armed truce, but no permanent peace ; no solid security to guard them against the repetition of injury and the renewal of attack.\*

In the debate in the house of commons on the address in January, 1794, Lord Mornington, (afterwards Marquis Wellesley,) in the course of a long and eloquent speech, distinctly avowed the object of the war in these terms, that " while the present, or any other Jacobin government exists in France, no propositions for peace can be made or received by us." In his reply, Mr. Fox did not fail to seize upon this avowal as a proof of inconsistency on the part of the minister, who in the previous session, although he deprecated the continuance of a Jacobin government, had nevertheless declared that he would not consider that as a bar to negotiation, provided the objects then held out, namely the safety of Holland, and the exclusive navigation of the Scheldt, could be secured. Vattel, than whom Mr. Fox knew no man more eminent in the science on which he has written, had laid it down as a principle, that every independent nation has an undoubted right to regulate its own form of government. He was aware that it had been asserted that arguments might be drawn from the publicists both for and against the right of international interference ; and that the authority of these writers had been denied even where they forbade such interference. But he held the opinions of eminent men, dispassionately given on subjects which they had accurately studied, to be of considerable importance. He considered those opinions formed under circumstances the most favorable to the discovery of truth, to be the result of unbiassed inquiry and minute investigation, and therefore entitled to great weight in regulating the conduct of nations. Those writers, in laying down their maxims, were not distracted by local prejudices or by partial interests ; they reasoned upon great principles,

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\* Parliamentary History of England, vol. xxx. p. 1015.

and upon a wide survey of the state of nations, and comparing the result of their own reflections with the lessons taught them by the experience of former ages, constructed that system which they conceived to be of most extensive utility and universal application.

Mr. Pitt complained of having been misrepresented as to his previous declarations respecting the object of the war. When the strict neutrality observed by Great Britain with respect to France had been mentioned, no injury had then been received from her. When circumstances altered, the same sentiments could not longer apply. If a particular country, divided into two parties, discovered hostile intentions with respect to another nation, it would surely be perfectly fair in that nation to endeavour to oppose those parties to one another. More especially if the continuance of a particular system was the ground of that enmity, would an interference to destroy that system be justifiable. Such was the precise state of the case between France and Great Britain. During the previous year that interference had been avowed and admitted as a ground of action, and its propriety could not surely be denied when a new scene presented itself more eventful and extraordinary even than those which had formerly been exhibited. Things had now come to such a crisis that he had no difficulty to declare, that while that system continued peace was less desirable to him than a war under any circumstances of disaster which he could possibly imagine.\*

On the 26th of January, 1795, Mr. Grey (now Earl Grey) made a motion in the house of commons "to declare it to be the opinion of this house, that the existence of the present government of France ought not to be considered as precluding, at that time, a negotiation for peace." When the notice of motion had been originally given, Mr. Pitt had declared his readiness to meet the question as proposed

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\* Parliamentary History of England, vol. xxx. pp. 1251, 1279.

by Mr. Grey. But when the debate came on, Mr. Pitt interposed the following amendment, "declaring the determination of this house to support the king in the prosecution of a just and necessary war ; and praying his majesty to employ the resources of the country to prosecute it with vigour and effect, until a pacification could be effected on just and honorable terms with any government of France capable of maintaining the accustomed relations of peace and amity with other countries." In support of this amendment, he observed that the restoration of monarchy in France, upon the old principles, had never been stated by his majesty, by ministers, or by parliament, as a condition *sine qua non* of peace. It had been stated, that the British government had no desire to interfere in the internal affairs of France ; and as long as that country had abstained from interfering in the affairs of other nations, and till hostilities had been actually commenced, Great Britain had adhered strictly to that declaration, and abstained from any such interference. When that interference actually took place, which was justifiable on every plain principle of the law of nations, she still confined herself to that degree of interference which was necessary for her own security and that of Europe. There had been great misconstructions with respect to what he had stated on former occasions to be his sentiments with respect to the re-establishment of monarchy in France, which he by no means wished to be considered as a *sine qua non* to the attainment of peace ; and therefore he had not contented himself with barely negating the resolution, but had been induced in the amendment to substitute that language which, in his mind, it became parliament to hold as best adapted to the subject.<sup>4</sup>

At the opening of the session of parliament in October, 1795, the king's speech stated that "the distraction and anarchy which had prevailed in France had led to a crisis,

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<sup>4</sup> Parliamentary History of England, vol. xxxi. p. 1212.

of which it was as yet impossible to foresee the issue ; but which, in all human probability, must produce consequences highly important to the interests of Europe." The ministers explained this declaration to mean, that when the new French constitution should be put in activity, with the acquiescence of the nation, so as to enable its legislature to speak as their representatives, Great Britain ought then to be prepared to negotiate, without any regard to the form or nature of the government. Accordingly a royal message was sent to the house of commons on the 9th of December, stating that "the crisis, which was depending at the beginning of the session, had led to such a state of things as would induce his majesty to meet any disposition to negotiate on the part of the enemy, with an earnest desire to give it the fullest and speediest effect, and to conclude a treaty of general peace, whenever it could be effected on just and suitable terms for his majesty and his allies."

In the mean time Prussia, Spain, and Holland had separated from the continental coalition, and each made their separate peace with the French republic. The former remained neutral, whilst the two latter powers became allies of France. The treaties of Basle in 1795, with Prussia and Spain, were followed by that of Campo Formio in 1797, with Austria. A negotiation for peace was at last opened between Great Britain and France, first at Paris in 1796, and subsequently at Lisle in 1797, in which interference in the internal affairs of the latter country was laid out of the question ; the negotiation turning exclusively upon the question, whether Great Britain should restore, without compensation, to France and her allies, Spain and Holland, the territorial acquisitions the former had made during the war.

On the establishment of the consular government in 1799, overtures were made on the part of France for peace between the two countries in the well known letter addressed by the first consul to the king. In the answer directed by Lord Grenville to M. de Talleyrand, on the 4th

of January, 1800, rejecting these overtures, it was stated that the best and most natural pledge of that security which was the object of the war on the part of Great Britain, would be the restoration of that line of princes which for so many centuries maintained the French nation in prosperity at home, and in consideration abroad : such an event would at any time remove all obstacles in the way of negotiation for peace. It would confirm to France the unmolested enjoyment of its ancient territory ; and it would give to all the other nations of Europe, in tranquility and peace, that security which they were then compelled to seek by other means. But desirable as such an event must be both to France and to the world, it was not to this mode exclusively that his Britannic majesty limited the possibility of secure and solid pacification. He made no claim to prescribe to France what should be the form of her government, or in whose hands she should vest the authority necessary for conducting the affairs of a great and powerful nation. His majesty looked only to the security of his own dominions, to that of his allies, and to the general safety of Europe. Whenever he should judge that such security could in any manner be attained, as resulting either from the internal situation of that country, from whose internal situation the danger had arisen, or from such other circumstances of whatever nature as might produce the same end, he would eagerly embrace the opportunity to concert with his allies the means of immediate and general pacification.

In the reply of M. de Talleyrand to this note, it was stated that the first consul could not doubt that his Britannic majesty recognized the right of nations to choose the form of their government, since it was from the exercise of this right that he held his crown ; but that the first consul had been unable to comprehend how to this fundamental principle, upon which rested the existence of political societies, the British minister could annex insinuations which tended to an interference in the internal affairs of the republic, and which were not less injurious to the French na-



tion and to its government, than it would be to England and its king, if a sort of invitation were held out in favour of that republican government, of which England adopted the forms in the middle of the last century, or an exhortation to recall to the throne that family whom their birth had placed there, and whom a revolution compelled to descend from it. The reply further added, that, if, at periods not far distant, (alluding to the negotiations at Paris and Lisle,) and when the constitutional system of the republic presented neither the strength nor the solidity which it contains at present, his Britannic majesty thought himself enabled to invite a negotiation and pacific conferences, how was it possible that he should not be eager to renew negotiations to which the present and reciprocal situation of affairs promised a rapid progress?<sup>a</sup>

§ 4. Maritime law of nations during the war of the French revolution.

It might have been expected that such a wide spread war of principles and of passions as that which now agitated Europe, and even extended to her colonies in the new world, would bring with it severe trials for those nations who wished to remain neutral, in this tremendous conflict. Soon after the breaking out of the maritime war, Great Britain stipulated with her allies Russia, Spain, Prussia, and Austria reciprocally to shut their ports against French ships, and not to permit the exportation from those ports to France of any military or naval stores, or corn, grain, salt-meat or other provisions, and to take all other measures in their power for injuring the commerce of France, and for bringing her by such means to just conditions of peace.

The contracting parties also engaged "to unite all their efforts to prevent, on this occasion of common concern to every civilized state, other powers not implicated in the war, from giving, in consequence of their neutrality, any protection whatever, directly or indirectly, to the commerce

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<sup>a</sup> Parliamentary History of England, vol. xxxiv. pp. 1197-1202.

or property of the French, on the sea or in the ports of France.”<sup>v</sup>

On the 9th of May, 1793, the national convention passed a decree setting forth, that whereas the neutral flag was not respected by the enemies of France, and that cargoes of corn, laden in neutral vessels bound to France, had been seized by the British government, in order to exercise against them the right of pre-emption, the French cruisers were authorized to capture neutral vessels laden with enemy's property, or with articles of provisions, (*comestibles*) the former to be confiscated, and the latter to be paid for according to their value at the place to which they were destined. This decree to cease to have its effect, so soon as the enemy powers should have declared free French property in neutral vessels, or provisions laden in such vessels bound to France.<sup>w</sup>

On the 8th of June, 1793, additional instructions were given to British cruisers authorizing them :

§ 5. British orders in council of June and November, 1793.

1. To detain all vessels laden with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France, and to send them into a British port in order to subject the cargoes to the right of pre-emption.

2. To seize all vessels, whatever might be their cargoes, that should be found attempting to enter any blockaded port, and to send them in for condemnation, together with their cargoes, except the ships of Denmark, and Sweden, which should be prevented from entering on the first attempt, but on the second should be sent in for condemnation.

3. Where the neutral vessels, bound to such blockaded port, appeared by their papers to have sailed from the ports of their respective countries before the declaration of blockade should have arrived there, they were to be notified, and

<sup>v</sup> Martens, *Recueil des Traités*, tom. v. pp. 441, 477, 485, 489.

<sup>w</sup> Code des Prises, tom. ii. pp. 136-140. Edit. Guichard, Thermidor an viii.

not to be captured unless they persisted in attempting to enter the blockaded port, in which case they were to be subjected to confiscation ; as well as all ships which should have sailed after the blockade was known in the country from which they came ; and all ships which, in the course of the voyage should have received notice of the blockade in any other manner, and yet persisted in attempting to enter the blockaded port.

On the 6th of November, 1793, further instructions were issued directing British cruizers to send in for adjudication all ships laden with the produce of any colony belonging to France, or carrying provisions or other supplies for the use of such colony.

This order revived the rule of the war 1756, relating to the enemy's colony trade, which, as we have already seen, had been suffered to slumber during the war of the American revolution. It was again modified by instructions issued on the 8th of January, 1794, by which British cruizers were directed to capture,

1. All vessels, with their cargoes, laden with the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe.

2. All vessels laden with the produce of said islands, the property of French subjects, to whatsoever ports the same might be bound.

3. All ships that should be found attempting to enter any port of the said islands blockaded by Great Britain or her allies.

4. All vessels laden with military or naval stores bound to any port of the said islands, to be proceeded against, together with their cargoes according to the law of nations.

The maritime powers whose navigation and commerce were principally affected by these measures were Denmark, Sweden, and the United States of America.

The death of Gustavus III, in March, 1792, deprived the coalition against France of its most chivalric, if not most

efficient confederate ; and Sweden returned to her natural position of a neutral power under the administration of the regent Duke of Sudermania. Denmark, guided by the wise and prudent counsels of her great minister, Bernstorff, still adhered to that pacific policy which she had maintained during the three last maritime wars of 1740, 1756, and 1778.

The courts of London, St. Petersburg, and Berlin made representations to those of Stockholm and Copenhagen, justifying the measures adopted by the belligerent powers upon the ground of the extraordinary character of the war which authorized a deviation from the ordinary maxims of international law. In the note presented by the British minister at Copenhagen to Count Bernstorff, it was also stated, that the only effectual means of reducing the enemy to just conditions of peace, was to prevent his being relieved from that state of famine, to which he had reduced himself by arming the whole population of France against Europe. That it was a principle universally recognized by the publicists that provisions might become contraband when there were hopes of reducing the enemy by famine. Still more justly might they be so regarded, when the distress of the enemy was occasioned by the unprecedented measures he had adopted to carry on a war, of a character equally unprecedented and which menaced the safety of the whole civilized world.

Count Bernstorff in his reply to this note, dated the 28th July, 1793, contested the principle that the extraordinary character of the war against the revolutionary government of France could change the law of nations or the obligation of treaties as to neutrals : or that reciprocal concessions could be considered as favours or privileges ; or that any two or more belligerent powers could make arrangements between themselves, at the expense of a third neutral power, in order to throw upon the latter any part of the burthens incident to a state of war. As a neutral state, Denmark protested against the order in council of the 8th of June, as

being in direct contradiction with the subsisting treaties between her and Great Britain, which expressly exempted corn and other provisions from being considered as contraband of war. Nor could it be reconciled with the acknowledged principles of international law. A neutral power fulfilled all its duties so long as it maintained a strict impartiality between the belligerent parties. Whether its neutrality was more favourable to the one than to the other party, depended on local and temporary circumstances, which might vary from time to time, and thus create a balance of mutual advantages and disadvantages. So long as the trade with France in corn and other provisions was confined to mere private speculations, it must be considered as an innocent commerce, even if the French government were one of the contracting parties, since the neutral merchant had the same right to sell to the government as to private individuals.\*

The note presented by the Russian minister to the Danish government at Copenhagen, on the 10th of August, 1793, announced that the Empress Catharine had equipped a fleet to cruise in the Baltic and North seas, in order to intercept the navigation and commerce of the French rebels, and to protect the coast against their piracies, with orders to seize all vessels under the French flag, and to detain and turn back all neutral vessels bound to the ports of France. That her imperial majesty had given sufficient proofs of her respect for neutral rights in endeavouring to establish a code of law for their protection, but that the usurpers of government in France had attacked all the neighbouring monarchies with open force, at the same time offering aid and succour to rebellion in every European state, by which means they had rendered neutrality impossible except to those powers whom prudence compelled to dissimulate their interest in the general cause. Those nations whom

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\* Martens, *Causes célèbres du Droit des Gens*, tom. ii. pp. 337-353.

circumstances did not permit to take an open part in the contest were bound to contribute by such means as were in their power, namely by the interdiction of all commercial intercourse with the disturbers of the public repose, and especially the exportation of provisions and naval stores. The Russian cabinet therefore proposed to that of Denmark to refuse convoy to all vessels bound to France, and to order all Danish vessels to submit to visitation and search on the part of Russian ships of war.

In reply to this proposition, Count Bernstorff stated, that Denmark had determined not to protect by convoy Danish vessels bound to France, and did not claim the right to carry naval stores to the ports of that country; but the belligerent rights which belong to a state of actual blockade could not be considered as applicable to circumstances so widely different; and that the trade in corn, unimportant to the interests of Russia as a belligerent, was not so to Denmark, since its prohibition involved the sacrifice of her independence, and her rights derived from treaties. That his Danish majesty would not, however, enter into a formal discussion of this point, her imperial majesty having declined the authority of the only competent judge, *the universal and particular law of nations*; that not being permitted to appeal to this, he would nevertheless appeal to the equity and friendship of her imperial majesty, cemented by the lapse of so many years, and by so many proofs; which he did with the more confidence as he had given decisive evidence of his own in waiving the right of insisting upon the liberty of navigation secured by the most solemn treaties which had been first proposed by her imperial majesty.

Sweden considered the British order in council of the 8th of June, 1793, in a more favorable point of view, inasmuch as she had stipulated by her treaty of commerce with England of 1661 to consider provisions as contraband. The order in council, which merely subjected them to the exercise of the right of preemption, was regarded by her

as a relaxation of the more rigorous rule of confiscation which might strictly have been asserted against her. This circumstance did not, however, prevent her joining Denmark in the convention signed at Copenhagen on the 27th of March, 1794, for the protection of the neutral commerce of the two countries. By this convention, the two sovereigns declared their intention to observe the most perfect neutrality during the war, claiming no other commercial privileges than such as were stipulated in their respective treaties with the belligerent parties ; or, in the cases not provided for by treaty, such as were founded upon the universal law of nations. The convention also provided for the fitting out of a combined squadron, which was stationed in the Sound, but which of course could not preserve the Danish and Swedish commerce from vexations in more distant seas.\*

The British order in council of the 8th June, 1793, was particularly obnoxious to the United States of America, as it restrained a very important branch in their accustomed commerce in their native produce. In the instructions given by Mr. Jefferson, then Secretary of State, to the American minister in London, dated the 7th September, 1793, it was stated that reason and usage had established that when two nations go to war, those who choose to live at peace retain their natural right to pursue their agriculture, manufactures, and usual vocations ; to carry the produce of their industry for exchange to all nations, belligerent or neutral as usual ; to go and come freely without injury or molestation ; and in short that the war among others should be for them as if it did not exist. Two restrictions on this natural right had been submitted to by nations at peace ; namely that of not furnishing to either party implements merely of war for the annoyance of the other, nor any thing whatever to a place blockaded by its enemy. What those implements of war

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\* Martens, *Causées célèbres du Droit des Gens*, tom. ii. p. 354-363.

are, had been so often agreed, and was so well understood as to leave little question about them at that day. Almost every nation had made a particular enumeration of them in its treaties under the name of contraband. Corn, flour, and meal had never been included in this enumeration, and consequently remained articles of free commerce. A culture, which like that of the soil gave employment to such a proportion of mankind, could never be suspended for them whenever any two nations should think proper to go to war. The state of war then existing furnished no legitimate right to either of these belligerent powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all other nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the exportation of that produce.\*

In the treaty of commerce and navigation concluded between Great Britain and the United States in 1794, it was stipulated (art. 18,) that under the denomination of contraband should be comprised military and naval stores "unwrought iron and fir planks only excepted." The article then goes on to provide, that "whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles not generally contraband, may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise : it is further agreed that whenever any such articles, so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated ; but the owners thereof shall be speedily and completely indemnified ; and the captors, or in their default, the government, under whose authority they act, shall pay to the masters or owners of such vessels the full

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\* American State Papers, vol. i. p. 393.



value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."<sup>a</sup>

The instruction of June, 1793, had been revoked previous to the signature of this treaty ; but before its ratification the British government issued in April, 1795, an order in council instructing its cruisers to stop and detain all vessels laden wholly, or in part, with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them into a British port in order that such corn, etc. might be purchased on behalf of the British government.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission constituted under the treaty to decide on the claims of American citizens by reason of irregular or illegal captures and condemnations of their property under the authority of the British government. The order in council was justified upon two ground :—

1. That it was made when there was a prospect of reducing the enemy to terms by famine, and that in such a state of things, provisions bound to the enemy's ports became so far contraband as to justify Great Britain in seizing them, upon condition of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.

2. That the order was justified by *necessity*, the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested, not only upon the general law of nations, but upon the above quoted article of the treaty between Great Britain and the United States.

The evidence adduced of this supposed law of nations was principally the following loose passage of Vattel :

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<sup>a</sup> Martens, Recueil, tom. v. p. 674.

"Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi, s'appellent *marchandises de contrebande*. Telles sont les armes, les munitions de guerre, les bois et tout ce qui sert à la construction et à l'armement des vaisseaux de guerre, les chevaux, et les vivres même, en certaines occasions où l'on espère de réduire l'ennemi par la faim."<sup>b</sup>

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not indicate what the circumstances are in which it might be held that "there are hopes of reducing the enemy by famine;" that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist except in certain defined cases, such as the actual seige, blockade, or investment of particular places. This answer would be rendered still more satisfactory by comparing the above quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered what Vattel does not profess to explain, the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity of relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. "Demetrius," as Grotius expressed it, "held Attica by the sword. He had taken the town of Rhammus, designing a famine in Athens, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city." Vat-

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<sup>b</sup> Vattel, *Droit des Gens*, liv. 3 ch. 7. § 112.

tel speaks of this as of a case in which provisions were contraband, (section 117,) and although he did not make use of this example for the declared purpose of rendering more specific the passage above cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband farther than that example would warrant.

It was also to be observed, that in sect. 113, he states expressly that all contraband goods, (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of sect. 112,) are to be confiscated. But nobody pretended that Great Britain could rightfully have confiscated the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had been long settled that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the order in council could not have been such a one as Vattel had in view; or in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

The authority of Grotius was also adduced as countenancing this position, and the same answer was given to it as in the observations we have already made upon his doctrine of contraband.\*

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\* First Period, § 14.

It was added that in his third book, (cap. xvii. sec. 1,) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above cited texts. And Rutherforth, in commenting on Grotius, (lib. iii. cap. 1, sec. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity, and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such that we cannot possibly do without them."<sup>d</sup>

Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above mentioned cases.<sup>e</sup>

It appeared, then, that so far as the authority of the text writers could influence the question, the order in council of 1795 could not be rested upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

If the mere hope, however apparently well founded, of annoying or reducing an enemy by intercepting the commerce of neutrals in articles of provision, (which in themselves are no more contraband than ordinary merchandize,) to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a seige or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions

<sup>d</sup> Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

<sup>e</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

and a thousand other articles. Men must be clothed as well as fed ; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other states, must be enfeebled and impoverished ; and if it is allowable to a belligerent to violate the freedom of neutral commerce in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing its reaching his ports, why not, upon the same expectation of annoyance, cut off, as far as possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources ?

As to the 18th article of the treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it ; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles not generally contraband might be regarded as such, (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine,) concurred in stipulating that " whenever any such articles, so becoming contraband, according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated," but the owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized ; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations,

made seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

As to the second ground upon which the order in council was justified, necessity, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized; it was answered, that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius and the other text writers on the subject concurred in stating that the necessity must be real and pressing and that even then it does not confer a right of appropriating the goods of others until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessities of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said, that under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before: it offered a bounty upon the importation of the articles of which it was

in want. The consequence was that neutrals came with these articles, until at length the market was found to be over stocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the treaty of 1794, to the owners of the vessels and cargoes seized under the orders in council, as well for the loss of a market as for the other consequences of their detention.<sup>f</sup>

We have already seen that the United States, in their treaty of 1778 with France, had adopted the principle of free ships free goods as the rule between the two countries. On the commencement of the maritime war in 1793, M. Genet the ministèr of the French republic in America, complained that French goods had been taken out of American vessels by British cruizers. In his answer to this complaint, Mr. Jefferson stated, that by the general law of nations, the goods of a friend, found in the vessel of an enemy are free, and the goods of an enemy, found in the vessel of a friend, are lawful prizes. Upon this principle, he presumed, the British armed vessels had taken the property of French citizens found in American vessels, in the cases referred to, and the American Secretary confessed he should be at a loss on what principle to reclaim it. It was true that several nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretence of having enemies goods on board, had, in many instances, introduced by their special treaties, another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms friendly goods; a principle much less embarrassing to

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<sup>f</sup> Proceedings of the Board of Commissioners under the seventh article of the treaty of 1794. MS. Opinion of Mr. W. Pinkney, case of the Neptune.

commerce, and equal to all parties in point of gain and loss ; but this was altogether the effect of particular treaty, controlling, in special cases, the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as he recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaty with France.<sup>s</sup> The United States had adopted this modification in their treaty with France, the United Netherlands, and Prussia ; and therefore, as to them American vessels covered the goods of their enemies, whilst the Americans lost their goods when in the vessels of their enemies. With England, Spain, Portugal, and Austria, the United States had nothing to oppose to these four powers acting according to the general law of nations, that enemy goods are lawful prize, though found in the vessels of a friend. Nor did he see that France could suffer on the whole, for though she lost her goods in American vessels when found therein by England, Spain, Portugal, or Austria ; yet she gained American goods, when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia : and it might safely be affirmed that the Americans had more goods afloat in the vessels of these six nations, than France had afloat in their vessels ; and consequently that France was the gainer, and America the loser by the principle of their treaty. Indeed the Americans were losers in every direction of that principle ; for when it worked in their favour, it was to save the goods of their friends, when it worked against them, it was to lose their own, and they would thus continue to lose while the rule was only par-

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<sup>s</sup> Mr. Jefferson is mistaken in this assertion, as there were at least two treaties of Great Britain in force at the time when he wrote by which she had conceded the rule of *free ships, free goods*, that of 1654 with Portugal, and that of 1674, with Holland. (See First Period, § 14.)



tially established. When they should have established it with all nations, they should be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition they were endeavouring to advance; but as it depended on the will of other nations, as well as their own, they could only obtain it when those other nations should be ready to concur.<sup>b</sup>

By the treaty of 1794 between Great Britain and the United States, art. 17, it was agreed, "that in all cases where vessels shall be captured or detained on just suspicions of having on board enemy's property, or of carrying to the enemy any of the articles which are contraband of war, the said vessel shall be brought to the nearest or most convenient port, and if any property of an enemy should be found on board of such vessel, that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment."<sup>i</sup>

§ 6. Discussion between the American and French governments upon the rule of free ships, free goods.

The French government complained not only, as we have seen, that the goods of her citizens were taken out of American vessels without resistance on the part of the American government; but that the latter had by its treaty with Great Britain violated its antecedent engagements to France recognizing the principles of the armed neutrality of 1780.

To this latter complaint, it was answered on the part of the American government, that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation therefore in the treaty of 1778 formed an exception to a general rule, which still

<sup>b</sup> American State Papers, vol. i. p. 134.

<sup>i</sup> Elliot's Dip. Cod. 236.

retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it entirely omitted any stipulation on this subject, the belligerent right would still have existed. The treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this principle by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests permitted them to arm in order to compel a surrender of the rights of others.<sup>k</sup>

On the 2d March, 1796, (12 Nivose, an V,) the executive directory published a decree by which they declared that the United States had renounced, by their treaty of 1794 with Great Britain the privileges heretofore enjoyed under their treaty of 1778 with France, and consequently declared enemy's property taken by French cruizers from on board American vessels to be good prize. This decree also extended the list of contraband contained in the treaty of 1778 to naval stores, with the exception of unwrought iron and fir planks as provided in the treaty of 1794. It also confiscated all American vessels not provided with a

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<sup>k</sup> Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Gerry, to M. de Talleyrand, Jan. 17, 1798. Waite's State Papers, vol. iv. pp. 38-47.

*rôle d'équipage*, in due form as provided by the treaty of 1778.

On the 18th of January, 1797, (29 Nivose, an VI,) the two councils of the republic passed a law declaring to be liable to capture and confiscation all neutral vessels laden with enemy's property.

These and other similar decrees issued during the government of the directory gave a wide range to the depredations committed on neutral commerce by French privateers, which were also aggravated by the irregular manner in which the jurisdiction of maritime captures was exercised by the judicial tribunals until the establishment of the council of prizes in 1800. The provisions of the treaty of 1778 with the United States, were then revived by a new convention, and the ordinance of that year was reestablished as the general rule by which the French cruizers and tribunals were to be governed in respect to those neutral nations between whom and France there existed no special treaty stipulations. So long as this wise and moderate legislation continued, and so long as the decisions of the council of prizes were conducted by that learned and virtuous magistrate, the late M. Portalis, there was no ground of complaint on the part of neutral powers as to the practical administration of the French prize code. But this system of moderation was succeeded, soon after the rupture of the peace of Amiens, by those measures of violence, the French imperial decrees, and British orders in council, by which the two governments, reverting to the piratical warfare of the dark ages, in effect, prohibited all neutral commerce, under the pretext of retaliating on each other. It is deemed unnecessary to dwell upon the history of these anomalous edicts, because they were avowedly measures of retortion, not in accordance with the ordinary law of nations, and were constantly protested against by neutrals as inconsistent with its principles.

§ 7. Question  
between G.  
Britain and

Whilst Russia, under her new sovereign the Emperor Paul, continued to coöperate in the continental and mari-

time coalition against France, the other Baltic powers, Sweden and Denmark, endeavoured to protect their neutral commerce from belligerent search by means of convoy. In January, 1798, a fleet of Swedish merchantmen, carrying cargoes of naval stores, the produce of Sweden and the property of Swedish subjects, to the Mediterranean ports in possession of France, under convoy of a ship of war, was captured by a British squadron; and proceeded against in the British court of admiralty for an alleged breach of the right of visitation and search. The case was suspended by diplomatic negotiations until the 11th of June, 1799, when it was brought to adjudication, and Sir William Scott pronounced his famous judgment upon the right in question, which afterwards became the subject of so much criticism and controversy.

the Northern powers as to the right of search of vessels under convoy.

In this judgment this learned civilian laid down the three following principles of international law :

1. That the right of visiting and searching merchant ships on the high seas, whatever be the ships, the cargoes, or the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say, be the ships, the cargoes, and the destination what they may, because till they are visited and searched, it does not appear what the ships, the cargoes, or the destination are; and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that free ships make free goods, must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as preëxisting, and

merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner himself, the great champion of neutral privileges."

2. That the authority of the neutral sovereign being forcibly interposed, cannot legally vary the rights of a lawfully commissioned belligerent cruiser. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it."

3. That the penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. "For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In book iii. c. 7, sec. 114, he expresses himself thus:—'*On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite, aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.*' Vattel is here to be considered, not as a lawyer, merely delivering an opinion, but as a witness asserting a fact; the fact that such is the existing practice of modern Europe. Conformably to this principle, we find in the

celebrated French ordinance of 1681, now in force, article 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the resistance alone is sufficient. He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance or combat.' And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, except what occurs in the Black Book of the admiralty, is in the order of council, 1664, art. 12, which directs, 'That when any ship, met withal by the royal navy or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize.' A similar article occurs in the proclamation of 1672. I am therefore warranted in saying that it was the rule and the undisputed rule of the British admiralty. I will not say that that rule may not have been broken in upon, in some instances, by considerations of comity or of policy, by which it may be fit that the administration of this species of law, should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all principles of reason,—upon the distinct authority of Vattel,—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral

vessel, to a lawful cruizer, is followed by the legal consequence of confiscation."<sup>1</sup>

In the month of December, 1799, a skirmish took place with a Danish frigate convoying a fleet of merchantmen near Gibraltar, in consequence of a refusal to submit to the exercise of the right of search by the British ships of war on that station. The British admiral requested the Danish commander to show his instructions, but the Dane declined to comply, alleging that he was forbidden to permit his convoy to be searched, and that in firing on the English boats he was only fulfilling his orders. The British admiral finally suffered the convoy to pass, and reported the matter to his government, by which, remonstrances were made to the Danish court, grounded on the principles laid down by Sir W. Scott in the above judgment.

In the reply of Count Bernstorff to the note of Mr. Merry, the British minister at Copenhagen, on this subject, dated the 19th April, 1800, it was not denied that both usage and treaties gave to the belligerent powers the right of visiting, by their ships of war or private armed vessels, neutral ships *not under convoy*. But this not being a natural, but only a purely conventional right, it could not justly be extended beyond what had been established by consent of the nations interested in the question. No maritime state had given its consent to the exercise of this right upon neutral vessels under convoy of its public ships of war. Its exercise had been expressly denied by solemn treaties which were still in force, and were founded upon a just distinction between merchant vessels under convoy, and those sailing without that protection. In the latter case, the exercise of the right of visitation and search was founded upon the right of examining their papers, in order to determine whether they are entitled to the immunities of the neutral flag. If this documentary evidence were found sufficient, no further

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<sup>1</sup> Robinson's Adm. Rep. vol. i. p. 340. *The Maria*.

search or detention was lawful, the authority of the neutral government in whose name these papers are delivered, furnishing the belligerent power sufficient security that the neutral character has not been fraudulently assumed. But the neutral government, in placing the vessels of its subjects under convoy of its own ships of war, furnishes still greater security in this respect, since it cannot without dishonour permit its own good faith to be questioned in such a transaction. The contrary principle would involve the absurd consequence that the most formidable fleet with a convoy under its protection would be subject to search by the most insignificant privateer. Certainly the British government, ever jealous of the honor of its national flag, would never submit to such an indignity, and his Danish majesty trusted to its sense of justice and equity that it would not insist on the exercise of a pretention towards other nations, which it was not prepared to yield, when neutral, to every independent power which might become belligerent.<sup>m</sup>

A more serious collision, however, originating in the same cause, soon followed. Another Danish frigate, the *Freya*, in attempting to defend her convoy from the search of the British cruizers at the mouth of the channel on the 25th July, 1800, provoked an engagement which occasioned loss of life on both sides. Satisfaction was demanded by the Danish minister in London, and refused by the British government, which insisted that it was entitled to an atonement for the unprovoked aggression, by which the lives of British seamen had been sacrificed, and the honour of its flag insulted, almost within sight of the shores of Great Britain; whilst these proceedings were supported by drawing in question her most indisputable rights founded on the clearest principles of the law of nations, from which

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<sup>m</sup> Schoell, *Histoire abrégée des Traités de Paix*, tom. vi. pp. 49-52. Martens, *Recueil*, tom. vii. pp. 127-133.



his majesty was determined never to depart, and the moderate exercise of which was indispensably necessary for the preservation of the dearest interests of his empire. Lord Grenville terminated his note to Count Wedel Jarlsberg by stating that *in order to give greater weight* to his representations and in order to furnish such explanations as might avoid the necessity of extreme measures, his majesty had determined to send Lord Whitworth on a special mission to the court of Denmark.

*In order to give greater weight to the representations* of Lord Whitworth, a British fleet was sent to the Sound, and placed under his orders. In the discussion which took place between that minister and Count Bernstorff, the former demanded reparation for the past and security against the repetition of similar aggressions for the future. In his answer, of the 16th August, Count Bernstorff stated, that it would be to confound the clearest ideas, and to invert the most natural and unequivocal signification of words and of things, to consider as a premeditated aggression, what was in fact a lawful resistance to an unprovoked attack upon the rights and honour of an independent flag. But even supposing that the commander of the Danish frigate had exceeded the bounds of his duty, and the British government would, in consequence, be entitled to satisfaction, it would result evidently from the nature of the case that the restitution of the Danish frigate and her convoy ought to precede the giving that satisfaction. This being done, his Danish majesty would be ready to receive any proposition consistent with the honour of his flag and the dignity of his crown. Lord Whitworth, in his answer of the 21st, recurred again to the principle, that resistance to belligerent visitation and search, on the part of a neutral, was a hostile act, which entitled him to be treated as an enemy, and that the interposition of convoy by the public ships of war of the neutral state was an aggravation of this hostile act. If the principle were once admitted that a Danish frigate could protect six merchant vessels from the exercise of this belli-

gerent right, it would follow that the same, or any other neutral power, might, by means of the smallest vessel of war, protect the entire commerce of the enemy of Great Britain. It would be sufficient to find one neutral state, however inconsiderable, disposed to lend the protection of its flag to that enemy, to exclude all further examination into the fraudulent abuse of the neutral character.

The negotiation was finally terminated by a convention, signed at Copenhagen on the 29th August, 1800, by which the question of right was reserved for ulterior discussion; the Danish frigate, and the vessels under her convoy, were restored; and it was agreed, that in order to prevent similar disputes, the Danish government should suspend the granting of convoy, until the question should be settled by a definitive convention.<sup>a</sup>

Whilst this negotiation was going on, the Emperor of Russia, who had separated himself, first from the alliance of Austria, and subsequently from that of Great Britain, proposed to the courts of Denmark, Prussia, and Sweden, to conclude a convention for the revival of the principles of the armed neutrality of 1780. This proposition was grounded principally upon the necessity of concerting on the part of the northern powers measures of defence against aggressions similar to that which it was alleged had been committed on the Danish frigate Freya; and the Emperor Paul no sooner heard of the arrival of a British fleet in the Sound, than he ordered a sequestration to be placed upon all British property in the Russian ports. The signature of the convention of the 29th August, between Denmark and Great Britain, induced him to retract this measure. But the refusal of the British government to deliver to him the possession of the island of Malta, which he claimed under an alleged agreement with that government, induced him to lay an embargo on all British vessels. Three trea-

§ 8. Armed  
Neutrality of  
1800.

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<sup>a</sup> Martens, *Recueil*, tom. vii. pp. 133-150.

ties were signed at St. Petersburg, on the 16th December, between Russia and Sweden and between Russia and Denmark ; and on the 18th, between Russia and Prussia ; and as each of these powers acceded to the treaties of the others with Russia, they formed together a sort of quadruple alliance.

By the first article of these treaties, the contracting parties agreed to prohibit to their subjects all trade in contraband of war with any of the belligerent powers.

The second article confined the list of contraband to military stores, as stipulated in the armed neutrality of 1780 by reference to the treaty of 1766 between Great Britain and Russia. But it was provided, that this stipulation should be without prejudice to the particular stipulations in anterior treaties with the belligerent parties, by which objects of a similar kind are reserved, prohibited, or permitted.

The third article provided, that the list of contraband articles, being thus determined and excluded from neutral commerce, the contracting parties had resolved that all other trade should remain perfectly free. It was further declared, by the same article, that in order to provide a sufficient security for the general principles of natural law, of which the freedom of commerce and navigation and the rights of neutral nations are a direct consequence, they had determined no longer to suffer them to depend upon arbitrary interpretation suggested by isolated and temporary interests. With this view they had agreed :

1. That every vessel may navigate freely, from port to port, and on the coasts of nations at war.
2. That the goods belonging to the subjects of the powers at war shall be free in neutral vessels, except contraband articles.
3. That to determine what is meant by a blockaded port, this denomination is only to be given to that where there is, by the arrangement of the power which attacks it with vessels, stationed sufficiently near so that there is an evi-

dent danger in attempting to enter it ; and that any vessel, sailing towards a blockaded port, should not be considered as contravening the convention, unless, after having been notified by the commander of the blockading force of the existence of the blockade, she should still endeavour to enter the blockaded port by means of force or fraud.

4. That neutral vessels shall only be detained for just cause and evident facts, that they shall be adjudged without delay, that the procedure shall be always uniform, prompt, and legal ; and that in every case, besides the damages awarded to the injured parties, complete satisfaction shall be given for the insult to the national flag.

5. That the declaration of the officers, commanding the public ships which shall accompany the convoy of one or more merchant vessels, that the ships of his convoy have no contraband articles on board, shall be deemed sufficient to prevent any search on board the convoying vessels or those under convoy.

The remaining articles provided for a joint armament to protect the neutral commerce of the subjects of the contracting parties, and for an eventual alliance, in case either of them should be attacked on account of these engagements.

The Danish government, at first, hesitated to ratify the treaty which had been signed by their ministers at St. Petersburg. It was already bound by the convention of Copenhagen to Great Britain not to grant convoys to its merchant vessels until the question should be finally determined between the two powers. An unconditional accession to the treaties of armed neutrality would seem to be a violation of its previous engagements with Great Britain. In the mean time, the British minister at Copenhagen, by his note dated the 27th December, had demanded a clear, frank, and satisfactory answer upon the nature, objects, and extent of the obligations Denmark might have contracted, or the negotiations she was still pursuing with the other northern powers. Count Bernstorff, in his reply

to this note, of the 31st December, denied that the engagements his government was upon the point of contracting were hostile to Great Britain, or inconsistent with the previous convention of the 29th August. He asserted, that a conditional and temporary suspension of the exercise of a right could not be considered as an abandonment of the right which was incontestable, and for the maintenance of which the northern powers were about to provide by a mutual concert, which far from compromising their neutrality, was intended to confirm it.

The British government replied to this note by an order in council, dated the 14th of January, 1801, laying an embargo on all Russian, Swedish, and Danish vessels. Lord Grenville notified this order to the ministers of Denmark and Sweden, declaring that the new maritime code of 1780, now sought to be revived, was an innovation highly injurious to the dearest interests of Great Britain, and which Russia herself had renounced by the engagements contracted between her and Great Britain at the commencement of the then present war.

These measures decided Denmark to adhere unconditionally to the armed neutrality by a declaration published on the 27th February, 1801.

Great Britain continued to temporize, from motives of policy, with Prussia, the remaining party to the northern alliance. This did not however prevent the Prussian cabinet from co-operating with Denmark in shutting the mouths of the Elbe and the Weser, against British commerce. The Danish troops occupied Hamburg and Lubeck, whilst Hanover and Bremen were seized by Prussia. In the mean time, the war commenced between the Baltic powers and Great Britain by the battle of Copenhagen, April 2d, 1801, the result of which produced an armistice with Denmark. The death of the Emperor Paul dissolved the confederacy which had been formed under his auspices. The armistice with Denmark was extended to Russia and Sweden and the Hanseatic towns were evacuated by the Danish

and Prussian troops. The embargoes were raised on both sides, and a negotiation opened at St. Petersburg for regulating the points in controversy.

This negotiation resulted in the signature of a convention between Great Britain and Russia on the 5th—17th of June, 1801, the preamble of which stated that: "The mutual desire of his majesty the King of the United Kingdoms, &c. and his majesty the Emperor of all the Russias, being, not only to come to an understanding between themselves, with respect to the differences which have lately interrupted the good understanding and friendly relations, which subsisted between the two states; but also to prevent, by frank and precise explanations upon the navigation of their respective subjects, the renewal of similar altercations and troubles, which might be the consequence of them; and the common object of the solicitude of their said majesties being to settle, as soon as can be done, an equitable arrangement of those differences, and an invariable determination of their principles upon the rights of neutrality, in their application to their respective monarchies, in order to unite more closely the ties of friendship and good intercourse, &c. have named for their plenipotentiaries, &c. who have agreed," &c.

§ 9. Maritime convention of 1801, between G. Britain, and Russia.

"Art. I. There shall be hereafter between his imperial majesty of all the Russias, and his Britannic majesty, their subjects, the states and countries under their dominions, good and unalterable friendship and understanding; and all the political, commercial, and other relations of common utility between the respective subjects, shall subsist as formerly, without their being disturbed or troubled in any manner whatever.

"II. His majesty the Emperor, and his Britannic majesty declare, that they will take the most especial care of the execution of the prohibitions against the trade of contraband of their subjects with the enemies of each of the high contracting parties.

"III. His imperial majesty of all the Russias, and his

Britannic majesty, having resolved to place, under a sufficient safeguard, the freedom of commerce and navigation of their subjects, in case one of them shall be at war, whilst the other shall be neuter, have agreed :

“ 1. That the ships of the neutral power shall navigate freely to the ports and upon the coasts of the nations at war.

“ 2. That the effects embarked on board neutral ships shall be free, with the exception of contraband of war, and of enemy's property ; and it is agreed, not to comprise in the number of the latter, the merchandize of the produce, growth, or manufacture, of countries at war, which should have been acquired by the subjects of the neutral power, and should be transported for their account ; which merchandize cannot be excepted, in any case, from the freedom granted to the flag of the said power.

“ 3. That, in order to avoid all ambiguity and misunderstanding of what ought to be considered as contraband of war, his imperial majesty of all the Russias, and his Britannic majesty declare, conformably to the 11th article of the treaty of commerce, concluded between the two crowns, on the 10th (21st) February, 1797, that they acknowledge as such, only the following articles, viz. cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, fire-locks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, swords, sword-belts, pouches, saddles, and bridles ; excepting, however, the quantity of the said articles which may be necessary for the defence of the ship, and of those who compose the crew ; and all other articles whatever, not enumerated here, shall not be reputed warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subject to the smallest difficulty, unless they be considered as enemy's property in the above settled sense. It is also agreed, that what is stipulated in the present article, shall not be to the prejudice of the particular stipulations of one or the other crown with other powers, by which objects of similar kind should be reserved, provided, or permitted.

" 4. That in order to determine what characterizes a blockaded port, that denomination is given only to that where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.

" 5. That the ships of the neutral power shall not be stopped, but upon just causes, and evident facts : that they be tried without delay, and that the proceedings be always uniform, prompt, and legal.

" In order the better to ensure the respect due to these stipulations, dictated by the sincere desire of conciliating all interests, and to give a new proof of their loyalty and love of justice, the high contracting parties enter here into the most formal engagement, to renew the severest prohibitions to their captains, whether of ships of war or merchantmen, to take, keep, or conceal, on board their ships, any of the objects, which, in the terms of the present convention, may be reputed contraband, and respectively to take care of the execution of the orders which they shall have published in their admiralties, and wherever it shall be necessary.

" IV. The two high contracting parties, wishing to prevent all subject of dissension in future, by limiting the right of search of merchant ships going under convoy, to the sole causes in which the belligerent power may experience a real prejudice, by the abuse of the neutral flag, have agreed :

" 1. That the right of searching merchant ships belonging to the subjects of one of the contracting powers, and navigating under convoy of a ship of war of the said power, shall only be exercised by ships of war of the belligerent party, and shall never extend to the fitters out of privateers, or other vessels, which do not belong to the imperial or royal fleet of their majesties, but which their subjects shall have fitted out for war.

" 2. That the proprietors of all merchant ships, belonging to the subjects of one of the contracting sovereigns, which



shall be destined to sail under convoy of a ship of war, shall be required, before they receive their sailing orders, to produce to the commander of the convoy, their passports and certificates, or sea-letters, in the form annexed to the present treaty.

“That when such ships of war, and every merchant ship under convoy, shall be met with by a ship or ships of war of the other contracting party, who shall then be in a state of war, in order to avoid all disorder, they shall keep out of cannon-shot, unless the situation of the sea, or the place of meeting, render a nearer approach necessary; and the commander of the ship of the belligerent power shall send a boat on board the convoy, where they shall proceed reciprocally to the verification of the papers and certificates that are to prove, on one part, that the ship of war is authorized to take under its escort, such or such merchant ships of its nation, laden with such a cargo, and for such a port: on the other part, that the ship of war of the belligerent party belongs to the imperial or royal fleet of their majesties.

“4. This verification being made, there shall be no pretence for any search, if the papers are found in due form, and if there exists no good motive for suspicion. In the contrary case, the captain of the neutral ship of war (being duly required thereto by the captain of the ship of war, or ships of war, of the belligerent power) is to bring to, and detain his convoy during the time necessary for the search of the ships which compose it, and he shall have the faculty of naming and delegating one or more officers to assist at the search of the said ships, which shall be done in his presence, on board each merchant ship, conjointly with one or more officers selected by the captain of the ship of the belligerent party.

“5. If it happen that the captain of the ship or ships of war of the power at war, having examined the papers found on board, and having interrogated the master and crew of the ship, shall see just and sufficient reason to detain the

merchant ship, in order to proceed to an ulterior search, he shall notify that intention to the captain of the convoy, who shall have the power to order an officer to remain on board the ship thus detained, and to assist at the examination of the cause of her detention. The merchant ship shall be carried immediately to the nearest and most convenient port belonging to the belligerent power, and the ulterior search shall be carried on with all possible diligence.

“V. It is also agreed, that if any merchant ship thus convoyed should be detained without just and sufficient cause, the commander of the ship, or ships of war, of the belligerent power, shall not only be bound to make to the owners of the ship and of the cargo, a full and perfect compensation for all the losses, expenses, damages, and costs, occasioned by such a detention, but shall farther be liable to an ulterior punishment for every act of violence or other fault which he may have committed, according as the nature of the case may require. On the other hand, no ship of war, with a convoy, shall be permitted, under any pretext whatsoever, to resist by force the detention of a merchant ship or ships, by the ship or ships of war of the belligerent power; an obligation which the commander of a ship of war with convoy is not bound to observe towards privateers and their fitters-out.

“VI. The high contracting powers shall give precise and efficacious orders, that the sentences upon prizes made at sea, shall be conformable with the rules of the most exact justice and equity; that they shall be given by judges above suspicion, and who shall not be interested in the matter. The government of the respective states shall take care that the said sentences shall be promptly and duly executed, according to the forms prescribed. In case of the unfounded detention, or other contravention of the regulations stipulated by the present treaty, the owners of such a ship and cargo shall be allowed damages proportioned to the loss occasioned by such detention. The rules to be observed for these damages, and for the case of unfounded

detention, as also the principles to be followed for the purpose of accelerating the process, shall be the subject of additional articles, which the contracting parties agree to settle between them, and which shall have the same force and validity as if they were inserted in the present act. For this purpose, their imperial and Britannic majesties mutually engage to put their hand to the salutary work, which may serve for the completion of these stipulations, and to communicate to each other without delay the views which may be suggested to them by their equal solicitude to prevent the least grounds for dispute in future.

“VII. To obviate all the inconveniences which may arise from the bad faith of those, who may avail themselves of the flag of a nation, without belonging to it, it is agreed to establish for an inviolable rule, that any vessel whatever, to be considered as the property of the country the flag of which it carries, must have on board the captain of the ship, and one-half of the crew of the people of that country, and the papers and passports in due and perfect form; but every vessel which shall not observe this rule, and which shall infringe the ordinances published on that head, shall lose all right to the protection of the contracting powers.

“VIII. The principles and measures adopted by the present act, shall be alike applicable to all the maritime wars, in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall, in consequence, be regarded as permanent, and shall serve for a constant rule to the contracting powers in matters of commerce and navigation.

“IX. His majesty the King of Denmark, and his majesty the King of Sweden, shall be immediately invited by his imperial majesty, in the name of the two contracting parties, to accede to the present convention, and at the same time to renew and confirm their respective treaties of commerce with his Britannic majesty; and his said majesty engages, by acts which shall have established that agreement, to render and restore to each of these powers, all

the prizes that have been taken from them, as well as the territories and countries under their dominion, which have been conquered by the arms of his Britannic majesty since the rupture, in the state in which those possessions were found, at the period at which the troops of his Britannic majesty entered them. The orders of his said majesty, for the restitution of those prizes and conquests, shall be immediately expedited after the exchange of the ratification of the acts by which Sweden and Denmark shall accede to the present treaty."

The court of Copenhagen acceded to this convention, on the 23d October, 1801, and that of Sweden, on the 18—30th March, 1802. The list of contraband inserted in the convention differed from that contained in the 11th article of the treaty of 1661 between Great Britain and Sweden, whilst the convention reserved the special stipulations of the contracting parties with other powers relating to contraband. In order to prevent a recurrence of the differences which had arisen relative to the 11th article of the treaty of 1661, a convention was signed at London on the 25th July, 1803, between Great Britain and Sweden, by which the list of contraband contained in the convention of 1801 was augmented with the addition of the articles of coined money, horses, and the necessary equipments of cavalry, ships of war, and all manufactured articles serving immediately for their equipment, all which articles were subjected to confiscation. It was further stipulated, that all naval stores, the produce of either country, should be subject to the right of pre-emption by the belligerent, upon condition of paying an indemnity of ten per centum upon the invoice price, or current value, with demurrage and expenses. If bound to a neutral port, and detained upon suspicion of being bound to an enemy's port, the vessels were to receive an indemnity, unless the belligerent government chose to exercise the right of pre-emption; in which case, the owners were to be entitled to receive the price which the goods would

have sold for at their destined port, with demurrage and expenses.\*

We have thought it necessary to dwell thus minutely upon the circumstances which attended the formation of the convention of 1801, because it may justly be considered, not merely as forming a new conventional law between the contracting parties, but as containing a recognition of universal pre-existing rights, which could not justly be withheld by them from other states. The avowed object of the treaty was to fix and declare the law of nations upon the several points which had been so much contested; the three northern powers yielding the point of *free ships, free goods*, and that of search subject to a modification, by which the exercise of the right was confined to public ships of war; and Great Britain yielding to all of them those relating to the colonial and coasting trade, to blockades, and to the mode of search; and yielding to Russia, moreover, the limitation of contraband to military stores. With respect to the question of convoys, a question not comprehended in the Armed Neutrality of 1780, a modification, satisfactory to the northern powers, was yielded by Great Britain.

That this is the true interpretation of the convention of 1801, was made evident in the course of the debate, which took place in the British house of lords on the 12th of November, 1801, on the production of the papers relating to that convention.

On this occasion Lord Grenville, who, together with his friend Mr. Pitt, had retired from the ministry, leaving their successors to make peace with France and the northern powers, declared his full conviction that the convention essentially impaired the system of maritime law which had been upheld by the British government. He stated that

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\* Schoel, *Histoire des Traités de Paix*, tom. vi. pp. 60-105. Martens, *Recueil*, tom. vii. pp. 150-281, tom. viii. p. 91.

the inadmissible pretensions of the Baltic powers had been countenanced by the weak and temporizing policy, which Great Britain had pursued towards them, in the last years of the war of the American revolution. At the commencement of the war of the French revolution, she had indeed obtained, by negotiation with all the principal governments of Europe, a renunciation of claims, which had never been advanced but with purposes hostile to her. The principles in question were, indeed, within a few years after the armed neutrality of 1780, renounced by almost every state which had been a party to that league ;<sup>p</sup> and in some of the official communications with the Baltic powers, during the war with France, pretensions were advanced, both by the Empress Catharine and her successor, which went to the full extent of the ancient maritime law of Europe.<sup>q</sup> The effects of this change of sentiment ensured to Great Britain, for several years, the undisturbed exercise of her maritime rights, in those quarters where they were the most important, both to her own interests, and to those of the common cause in which she was engaged. But when caprice and groundless disgust were suffered to interrupt this well considered system of policy at Petersburg, the former pretensions of the neutral powers were soon renewed with increased hostility ; and it last became manifest, upon the signature of the convention of armed neutrality of 1800, that unless Great Britain could then resolve to meet the necessity of the case, by bringing these questions to a dis-

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<sup>p</sup> By Russia, in her war with Turkey in 1787 ; by Sweden, in her war with Russia in 1789 ; by Russia, Prussia, Austria, Spain, Portugal and America, in their treaties with Great Britain during the first war of the French revolution ; by Denmark and Sweden, in their instructions issued in 1793, when neutral ; and in their treaty with each other in 1794 ; and by Prussia again in her treaty with America of 1799. (Note by Lord Grenville.)

<sup>q</sup> See Russian declaration to Sweden, July 30, 1793. Instructions to Admiral Tchatchagoff, July 24, 1793. See also Russian treaty of commerce 1797 with Great Britain, article x.

tinct and final settlement, they would always be found to impede her operations, and embarrass her exertions in every future period of difficulty or danger.

The principal objection stated by Lord Grenville to the convention of 1801 was, that in the form and wording of its different articles, the two hostile conventions of armed neutrality had been followed, with a scrupulous and servile exactness, wherever they could be made to apply. Great Britain had, therefore, negotiated and concluded that treaty on the basis of the very same inadmissible conventions, which she actually went to war for the purpose of annulling. And she then stood in the face of Europe, no longer as resisting, but as acceding to the treaties of armed neutrality; with modifications indeed, and changes in some important points; but sanctioning, by that concession, the general weight and authority of transactions, which she had before considered as gross violations of public law, as manifest indications of hostile purpose, and as sufficient grounds to justify, on her part, the extremities of war itself. Whatever principles of maritime law might thereafter be contested, they must be discussed with some regard to the treaties of armed neutrality. Whatever words of doubtful interpretation were transferred from those treaties into the convention, (and many such were transferred,) must, according to one of the best rules of legitimate construction, be explained by a reference to the original instrument, where they were first introduced into the code of public law.

It was, therefore, under this impression that they must proceed to examine the convention of 1801, and to compare it with those claims, for which Great Britain determined, at the commencement of the year, that it was necessary, even under all the difficulties of that moment, to incur the additional dangers of a northern war. Those claims were included in five separate propositions or principles of maritime law, every one of which the neutral league of 1800, had bound the contracting parties in that engagement to re-

sist by force : and every one of which their lordships had agreed with the ministry of that day, in considering as essentially necessary to be maintained for the preservation of the maritime strength of Great Britain, and, consequently for the means even of her domestic security.

The propositions were as follows :

1. That it is not lawful to neutral nations to carry on, in time of war, for the advantage, or on the behalf of one of the belligerent powers, those branches of its commerce, from which they are excluded in time of peace.

2. That every belligerent power may capture the property of its enemies, wherever it shall be met with on the high seas ; and may, for that purpose, detain and bring into port neutral vessels laden wholly or in part with any such property.

3. That under the description of contraband of war, which neutrals are prohibited from carrying to the belligerent powers, the law of nations (if not restrained by special treaty,) includes all naval as well as all military stores ; and generally all articles serving principally, according to the circumstances of the war, to afford to one belligerent power the instruments and means of annoyance to be used against the other.

4. That it is lawful to naval powers, when engaged in war, to blockade the ports of their enemies by cruising squadrons, *bona fide* allotted to that service, and fairly competent to its execution. That such blockade is valid and legitimate, although there be no design to attack or to reduce by force the port, fort, or arsenal to which it is applied. And that the fact of the blockade, coupled with due notice thereof to the neutral powers, shall affect, not only vessels actually intercepted in the attempt to enter the blockaded port, but those ships also, which shall elsewhere be met with, and shall be found to have been destined to such port, under the circumstances of the fact and notice of its blockade.

5. That the right of visiting and examining neutral ves-



sels is a necessary consequence of these principles ; and that by the law of nations, (when unrestrained by treaty,) this right is not in any manner affected by the presence of a neutral ship of war, having under its convoy merchant ships, either of its own nation or of any other country.

The first of these principles established the rule under which the belligerent refuses to neutrals the liberty of carrying on, during war, those parts of his enemy's trade, from which they are usually excluded in time of peace. This rule had, in the British practice, been principally applied to the coasting and colonial trade of France. From both these branches of her trade, France had, in every period of peace, excluded all vessels but her own ; with occasional exceptions only, such as more strongly proved her general principle of exclusion. But in war she had always found it impossible to maintain these monopolies. Pressed, on the one hand, by the naval superiority of Great Britain, which had rendered the navigation of French ships unsafe, and unable, on the other hand, to forego the resources which depend entirely on these important branches of her commerce, France had frequently endeavoured, under these special circumstances, to open both her colonial and her coasting trade to neutral vessels. The right to carry on unmolested both these branches of commerce was claimed by the northern powers in the league of armed neutrality of 1780 and of 1800. The claim, which the confederates thus asserted, was, so far as related directly to the coasting trade, expressed in the 3d article of the convention of 1800 as follows : " That neutral ships may navigate freely from port to port, and on the coasts of the belligerent powers." The convention of 1801 had adopted very nearly the same expressions. By the first section, of what there, also, stood as the third article, neutral ships are permitted " to navigate freely to the ports and upon the coasts of the belligerent powers." And in the next section of the same article, corresponding also, (though with a variation respecting enemy's property,) with a clause in the treaty

of armed neutrality of 1800, it was expressly declared, that "the effects embarked on board neutral ships shall be free, with the exception of contraband of war, and of enemy's property." A free navigation to the ports, and upon the coasts, of any country, must imply the liberty of navigating freely, both to and from all those ports, and upon every part of those coasts. If any limitation of this liberty had been intended, it would have been stated in the exceptions, specified in the convention, to the otherwise unrestrained freedom of navigation to the enemy's ports, which neutrals were thence forward to enjoy. Among the exceptions thus specified, not even the most distant reference is to be found to that principle respecting the coasting trade which Great Britain had asserted. The liberty of sailing freely to any hostile port was plainly conceded : but it was not even intimated, much less declared, that this permission was not to extend to ships laden with commodities purchased at any other port of the same country. Nor would it be easy to explain in any other sense than that of a deliberate and intentional concession of the coasting trade, the admission of those words which guaranty to neutrals the free navigation, not only to the ports, but "upon the coasts of the powers at war." If a direct trade only, from the neutral country to the belligerent ports had been intended, the first words of the section had amply secured it. If it was meant to permit a partial and successive discharge of the different articles of the cargo, at different ports, this also was secured by the general and unqualified permission to sail freely to those ports. The words "upon the coasts" were first introduced into the treaty of armed neutrality in 1790. They were there employed for the express purpose of asserting the right of neutrals to carry on the coasting trade of the belligerents. From that treaty they had since been carefully transcribed, first into the hostile convention of 1800, and now again into the conciliatory arrangement of 1801, to which they were thenceforth to look for the rule of maritime law.

But even supposing the sense of the convention of 1801 was ambiguous, as to the coasting trade, there could be no doubt that it had surrendered to neutrals the right to carry on the enemy's colonial trade. The only relaxation which had been allowed by Great Britain, during the war with France, of the principle asserted by her, was that contained in the order in council of January 8th, 1794, the effect of which was to permit neutral vessels to carry to the ports of the United States the produce of the French colonies. In other respects, the previous order of the 6th November, 1793, still remained in full force, unless it were annulled by the convention of 1801. The second section of the third article of this treaty distinctly provided, that all "the effects embarked on board neutral ships shall be free, with the exception of contraband of war and enemy's property; and it is agreed not to comprise in the number of the latter, the merchandize of the produce, growth, or manufacture of countries at war, which should have been acquired by the subjects of the neutral power, and should be transported for their account; which merchandize cannot be excepted, in any case, from the freedom granted to the flag of the said power." It was impossible to apply these words to any other case than that of the trade in the produce of the French colonies, become the property of neutrals, which was declared to be free in neutral vessels, whatever might be the destination, whether to a neutral country or even to France itself.\*

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\* It should be observed that the right to carry on the colonial trade granted by this article was subsequently limited by the explanatory declaration, which had already been signed at Moscow at the time when Lord Grenville was speaking, though unknown to him, by which it was agreed that "the freedom of commerce and navigation, granted by the said article to the subjects of a neutral power, does not authorize them to carry, in time of war, the produce or merchandize of the colonies of the belligerent power, direct to the continental possessions, nor *vice versa*, from the mother country to the enemy's colonies; but that the said subjects are, however, to enjoy the same advantages and facilities in this commerce as are

As to the British claim, in respect to the liability to capture and confiscation of enemy's property, found on board of neutral vessels, Lord Grenville admitted that it was fully recognized by the second section of the third article of the convention, which implied a relinquishment of the opposite principle of *free ships, free goods* on the part of the northern powers.

The stipulation in the third section of the same article, relating to contraband of war, must be considered in connection with the second *separate* article of the convention, by which the treaty of commerce of the 10—21 February, 1797, was "confirmed anew, and all its stipulations repeated to be maintained in their whole extent." The effect of this article was to reestablish the treaty of 1797, which had, by a temporary stipulation, admitted the subjects of the Russian empire to carry, in their own ships, naval stores to the enemy's ports. The treaty itself would soon expire, but the privilege it granted to Russia of carrying naval stores would not expire with it. The article which contained that stipulation had been separated from all commercial stipulations, and transferred from the temporary treaty of 1797 into the convention of 1801, which was expressly declared to be perpetual.\* The third and fourth sections of this article, which treat of contraband and of blockaded ports, did each of them expressly contain, not the concession of any special privilege to be thenceforth enjoyed by the contracting parties only, but the recognition of an universal and preëxisting right, which, as such, could

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enjoyed by the most favoured nation, and especially by the United States of America." (Martens, *Recueil*, tom. vii. p. 371.)

\* "Art. viii. The principles and measures adopted by the present act shall be alike applicable to all the maritime wars in which one of the two powers may be engaged whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve for a constant rule to the contracting powers in matters of commerce and navigation."

not justly be refused to any other independent state. The third section, relating to contraband of war, was, in all its parts strictly declaratory. It was introduced by a separate preamble, announcing that its object was to prevent "all ambiguity or misunderstanding as to what ought to be considered as contraband of war." Conformably with this intention, the contracting parties declared, in the body of the clause, what were the only commodities which they acknowledge as such. And this declaration was followed by a special reserve, that "it shall not prejudice their particular treaties with other powers."

If the parties had intended to treat of this question only as it related to their own conduct towards each other, and to leave it, in that respect, on the same footing on which it stood before the formation of the hostile league of 1800, all mention of contraband in that part of the convention would evidently have been superfluous. Nothing more could, in that case, be necessary than to renew the former treaties which had specified the lists of contraband; and as that renewal was expressly stipulated in another article of the convention, the third section must be considered as introduced for some distinct purpose. It must therefore unquestionably be understood in that larger sense announced in its preamble, and expressed in the words of the declaration which it contained. It must be taken as laying down a general rule for all future discussions with any power whatever, on the subject of military or naval stores, and as establishing a principle of law which was to decide universally on a just interpretation of the technical term of contraband of war. The reservation, made in the conclusion of the section, of special treaties with other powers, was manifestly inconsistent with any more limited construction. It was unnecessary to declare that a stipulation, extending only to the Baltic powers, should not prejudice the subsisting treaties of Great Britain with other nations. But the reserve was not only prudent, but necessary, when she undertook to lay down a universal principle, applicable

to all her transactions with every independent state. In recognizing a claim of preëxisting right, and in establishing a new interpretation of the law of nations, it was unquestionably of extreme importance expressly to reserve the more favourable practice which her subsisting treaties had established with some other powers.

The interpretation given to the term contraband of war in the convention was drawn exclusively from the treaties of armed neutrality. In the league of 1780, the Empress of Russia had thought proper to declare that her engagements with Great Britain on the subject of contraband should thenceforth be considered as the invariable rule of natural and universal right. The convention of 1801 adopted the same rule, and adopted it on the same ground; enumerating all the commodities mentioned in the treaty of 1797 between Great Britain and Russia; declaring, that conformably to that treaty, the two sovereigns acknowledge those commodities alone as contraband of war. Great Britain must, in all future discussions with other neutral powers, abide the consequences of that new rule of public law which she had herself thought proper to proclaim. She had publicly deserted her former claim, had confessed that naval stores ought not to be considered as contraband of war, and that she herself no longer acknowledged them as such. She had expressed this avowal in the very words originally intended for the purpose of making it universal; and had inserted it in her treaties with those very powers, who had confederated for no other object than to enforce her observance of it.

The stipulation on the subject of blockaded ports was also transcribed, with the variation of a single word, from the corresponding articles of the two conventions of armed neutrality. Those articles had declared, in substance, that no port should be considered as blockaded, unless where the power attacking it should maintain a squadron, constantly stationed before it, and sufficiently near to create an evident danger of entering. In the convention of 1801,

instead of the words, "*and* sufficiently near," the contracting parties had substituted, "*or* sufficiently near." And he had not the smallest doubt that by this minute change, trifling and unimportant as it was, they intended to establish, in their full extent, the principles which Great Britain had maintained on this great question of maritime blockade, and which the article, in its original state, as it stood in the two neutral conventions was intended completely to subvert. But what he complained of, was the glaring impolicy of resting so important a principle on the minute and scarcely perceptible variation of a single particle. He stated, however, two other objections to the article :

1. That when it spoke of the power which attacks the port, it seems, in some degree, to countenance the unfounded assertion that a blockade by sea, like that by land, required an actual design of reducing or conquering the particular place to which it was applied. Whereas Great Britain maintained, in her naval wars with France, as Holland formerly maintained in her contest with Spain, that the blockade of one or more of the enemy's ports, or even of a considerable extent of his coasts, may lawfully be adopted for the special purpose of intercepting his supplies, in order, by this pressure, to reduce him to just and reasonable conditions of peace.

2. The second objection arose from the very nature of all naval operations, depending so much on the variations of weather, by which a squadron blockading a hostile port, and fully equal to the execution of that service, might, nevertheless, occasionally be unable to remain either stationary before the port, or even sufficiently near it to create at all times an evident danger of entering. And if, as the words of the article imported, the blockade was understood to continue so long only as that danger actually existed, and was on the other hand to be considered as being raised as often as the danger ceased, even if for the shortest interval, the utmost confusion must inevitably arise in all cases but particularly in those of neutral ships met with at a dis-

tance from the blockaded port, but destined to it. It might indeed be asserted, without the least exaggeration, that even giving the fullest weight to that minute verbal change, on which so much was made to depend, a strict adherence to the letter of that stipulation must utterly destroy the whole British system of blockade by cruising squadrons.

Lord Grenville then proceeded to consider the stipulations of the convention as it respects the visiting and examining neutral vessels under convoy. The claim of the neutral league of 1800 confined this examination to a bare perusal of the papers of the neutral ships; which papers were, for that purpose, to be communicated to the belligerent by the neutral officer on board his own vessel. Exactly the same proceeding had been stipulated in the convention of 1801, and it was added, in both treaties, that if the papers so communicated should be found to be regular, no further search should take place. An exception, however, was subjoined in that of 1801, which constituted the only practical difference on the subject between the two conventions. It was not, as before, laid down absolutely, that no further search should, in any case, take place, but that none should take place "unless some valid motive of suspicion shall exist." Good faith forbade its being contended that the right, from which the belligerent had agreed to abstain, except when some valid ground of suspicion should exist, might still be indiscriminately exercised at his discretion. As the practice had before stood, the inquiry into the facts of the case preceded all conclusions to be drawn from them. The suspicion arose from the search, and the detention of the ship was its just and natural effect. As the law would stand under the convention, suspicion must precede inquiry; and very few cases were likely to occur, where any valid ground of suspicion respecting a neutral ship could *bona fide* exist before the search. It was then but too manifest, that while they had, in words, established the right of visiting ships under neutral convoy, they had, in fact, so limited and circumscribed the practice, as utterly to re-



nounce every beneficial purpose to which it could, by any possibility, be applied.<sup>†</sup>

In order to complete our view of the controversy growing out of the armed neutrality, it is only necessary to add that both in the preliminary treaty of peace between France and Great Britain signed in 1801, and in the definitive treaty concluded at Amiens in the following year, a total silence was observed respecting the disputed points of maritime law. On the rupture which took place between Great Britain and Russia in consequence of the attack upon Copenhagen and capture of the Danish fleet, the Russian government published on the 26th October, 1807, a declaration forever annulling the maritime convention of 1801, and proclaiming "anew the principles of the armed neutrality, that monument of the wisdom of the Empress Catharine," and engaging never to derogate from this system.

The British government published, on the 18th December, an answer to this declaration proclaiming "anew the principles of maritime law, against which was directed the armed neutrality under the auspices of the Empress Catharine." It was stated that these principles had been recognized by all the powers of Europe who framed that league, and no one more strictly conformed to them than Russia herself under the reign of the Empress Catharine. It was the right, as well as the duty of his majesty to maintain these principles, which he was determined to do against every confederacy with the assistance of divine Providence. The subsequent treaties of peace and of commerce between the two powers are totally silent upon the disputed points.<sup>‡</sup>

<sup>†</sup> Speech delivered by Lord Grenville in the house of lords, Nov. 13th, 1801, *Parliamentary History of England*, vol. xxxvi. pp. 200-255. For the very lame and inconclusive replies made by other speakers, see same work, pp. 256-263.

<sup>‡</sup> Martens, *Manuel diplomatique sur les Droits des Neutres sur Mer*, p. 69. The questions involved in the controversy, respecting the armed neu-

The treaties of peace signed at Paris in 1814-15, between France and the allied powers, are equally silent upon the contested questions of maritime law. These questions had been, in the mean time, absorbed in more pressing interests involving the very existence of those powers which they concerned. The war of the French revolution, in its origin a war of principles, and which might be considered as defensive on each side according to the different views taken of those principles, had become in its progress a contest for territorial dominion on one side, and for the independence of nations on the other, which extended its wide spread desolation over the civilized world both the old and the new. This mighty contest involved the destruction of the balance of power and the federative system of Europe, as constituted by the treaties of Westphalia and Utrecht; the final partition of Poland between the three neighbouring monarchies; the overthrow of the ancient republics of Holland, Venice, and Genoa; the subversion of the two branches of the house of Bourbon in Naples and Spain; the forcible expulsion of the house of Braganza from Portugal; the dissolution of the Germanic empire, with the formation of a new league of its secondary states, under the protection of France, under the title of the confederation of the Rhine; and the emancipation of the Spanish and Portuguese colonies on the American continent. Each successive treaty of peace was but a temporary truce, during which the suspension of hostilities enabled each party to gather fresh strength to renew the struggle. Such was the true nature of the treaties concluded by France

§ 10. Treaties of Paris, 1814-15.

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trality, became the subject of polemic discussion by various public jurists, both in belligerent and neutral countries. Among these works one of the most remarkable was the examination of the judgment of Sir W. Scott in the case of the Swedish convoy by Professor J. F. W. Schlegel published at Copenhagen in 1800. It was replied to by Dr. Croke in his Remarks upon Mr. Schlegel's Work upon the Visitation of Neutral Vessels under Convoy, London, 1801.

with Great Britain at Amiens in 1802 ; with Austria at Campo Formio in 1797 ; at Luneville in 1801 ; at Presburg in 1805 ; at Vienna in 1809 ; with Prussia and Russia at Tilsit in 1807. It is only necessary to examine the various manifestoes published by the allied powers on the rupture of each of these temporary suspensions of hostilities, to be convinced that it was not so much any immediate provocation on the part of France, as the indications furnished, by her general conduct and policy, of designs inconsistent with the maintenance of a just balance of power in Europe, which induced the allies again to take up arms. The danger of universal monarchy, once perhaps vainly apprehended from the ambitious designs of the houses of Austria and Bourbon, was at last realized from the genius of one man, who wielded with unexampled energy the vast natural resources of France, whose power of aggression had been fearfully augmented by revolution and conquest. This long protracted and violent struggle was too often marked in its course by the most flagrant violations of the positive law of nations, almost always accompanied, however, by a formal recognition of its general maxims, and excused or palliated on the ground of overruling necessity, or the example of others justifying a resort to retaliation. The mighty convulsion, in which all the moral elements of European society seemed to be mingled in confusion, at last subsided, leaving behind it fewer traces of its destructive progress than might have been expected, so far as regards a general respect for the rules of justice acknowledged by civilized communities in their mutual intercourse. It is true that the war of the French revolution was finally closed by the complete triumph of the principle of armed intervention asserted by the allied powers, but not until the conduct of France had justified their interference, (which at first might have appeared an unwarrantable aggression,) not merely in attempting to propagate her principles, but in seeking to extend her dominion by the sword. After having occupied the greater part of the continent by her

victorious army, she was at last stripped of all her conquests made since 1791, and reduced by the peace of Paris 1814–15 to her ancient limits and possessions, with the exception of the department of Vaucluse and other *enclaves* permanently united to France, and of certain fortresses on the northern frontier ceded by her to Prussia and to the kingdom of the Netherlands.

By the 7th article of the treaty of Paris, 1814, the sovereignty of the island of Malta, the dispute respecting which had been the ostensible cause of the rupture of the peace of Amiens, was confirmed to Great Britain.

By the 8th article, France ceded to Great Britain the islands of Tobago, Saint Lucia, and Mauritius with their dependencies; whilst she receded to Spain that part of St. Domingo which had been ceded to France by the treaty of Basle. Great Britain, at the same time restored to France all the colonies, factories, and establishments of every kind possessed by the latter power on the 1st of January, 1792, in the seas and upon the continents of America, Asia, and Africa.

By a separate convention signed at London on the 13th of August, 1814, between Great Britain and Holland, the latter power ceded to the former the cape of Good Hope, with the colonies of Demarara, Essequibo, and Berbice; whilst Great Britain restored to Holland the colonies, factories, and establishments of which the latter was in possession on the 1st of January, 1803, in the seas and upon the continents of America, Asia, and Africa. The effect of this stipulation was to leave Great Britain in possession of the island of Ceylon which had been ceded to her by Holland at the peace of Amiens.

By a convention signed at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it was stipulated that the seven Ionian islands should form a distinct free and independent state under the denomina-

tion of the United States of the Ionian Islands, and under the immediate protection of Great Britain.<sup>v</sup>

The treaty of Paris, 1814, had laid down the general basis on which the final pacification of Europe was to be concluded, and had referred to a general congress, to be assembled at Vienna, the arrangements necessary to complete the dispositions of that treaty.

By the first of the secret articles of the treaty the four allied powers, Austria, Great Britain, Prussia, and Russia, reserved to themselves exclusively the disposition of the territories ceded by France in the third article of the patent treaty; and it was stipulated, that the relations, from which a system of permanent equilibrium was to result, should be regulated at the congress upon such bases as should be determined among the allies.

By the second secret article, the King of Sardinia was to receive the state of Genoa as an accession to his territories.

By the third secret article, the countries comprised between the sea, the new frontiers of France, and the Meuse, were to be perpetually annexed to Holland; and the freedom of navigation on the Scheldt to be reëstablished, on the same principles, which regulated in the patent treaty that of the Rhine.

By the fourth secret article, the countries of Germany on the left bank of the Rhine, which had been annexed to France since 1791, were to be appropriated to the aggrandizement of Holland, and to the indemnification of Prussia, and other states.

§ 11. Congress  
of Vienna.

On the meeting of the congress, the four great allied powers, at first, asserted the pretension of disposing of the territories ceded by France, without consulting that power, or the other states represented in the congress. But this pretension was ultimately renounced, in point of form; and

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<sup>v</sup> Martens, nouveau recueil, tom. vi. pp. 6-58, 663.

a directing committee was constituted, consisting of the representatives of the eight powers, parties to the treaty of Paris, viz : Austria, Great Britain, France, Russia, Prussia, Spain, Sweden, and Portugal. To this committee was referred the disposition of the vacant territories and the other general business of the congress.

This general committee named three other select committees, to the first of which was referred the organization of the federal compact of Germany, to the second the affairs of Switzerland, and to the third those of Italy.

In the discussion of the territorial arrangements consequent upon the peace, several important questions arose, which might seem to require an appeal to the strict principles of international law, but which were ultimately determined by considerations of policy, and that state necessity which has been too often substituted in the place of justice in the transactions of nations.

The most important of these questions was that of Poland, which was also closely connected with that of Saxony. These joint questions were referred to a select committee consisting of the representatives of the five great powers. Russia had reconquered, and insisted upon retaining all that part of ancient Poland which had been erected by Napoleon into a new state, under the title of the Duchy of Warsaw, and of which the King of Saxony was the nominal sovereign. Prussia also claimed the entire kingdom of Saxony by right of conquest, and as an indemnity for the territories she had lost by the peace of Tilsit in 1807. These two powers mutually sustained each other's pretensions, which were opposed, wholly or partially, by Austria, France, and Great Britain.

§ 12. Questions of Poland and Saxony.

In the discussion of these joint questions, the British plenipotentiary, Lord Castlereagh, declared that if the incorporation of all the Saxon states into the Prussian monarchy could be shown to be necessary for the reconstruction of that monarchy on a solid foundation, he would have no hesitation in assenting to such a measure on the part of

his government. But if this incorporation were intended to indemnify Prussia for the losses of territory allotted to her in the final partition of Poland, which territory was now to be annexed to Russia, thus placing the former power in a state of evident dependence upon the latter, Great Britain would never consent to such an arrangement. He also addressed several memoirs to the Emperor Alexander, in which he protested against the erection of a kingdom of Poland, which should be united to, and which should make part of the Russian empire, and expressed the desire of his court to see an independent power, more or less considerable in extent, established in Poland under a distinct dynasty, and forming an intermediate state between the three great monarchies of Russia, Austria, and Prussia.<sup>w</sup>

The Prussian plenipotentiary, Prince Hardenberg, in a memoir annexed to his note of the 20th December, 1814, treated the question of the proposed incorporation of Saxony under the three following points of view :

1. According to the principles of the law of nations.
2. According to the political interests of Germany.
3. According to the interest of Saxony herself.

Under the first head, which is all that is material to our present purpose, it was stated that the right of conquest gives a lawful title to acquire the sovereignty of a conquered country. The authority of the public jurists was cited to this effect.<sup>x</sup>

The qualification of the principle cited by the Prussian minister from Vattel, that the right acquired by conquest

<sup>w</sup> Klüber, *Actes des Wiener Congresses*, vii. B'd, 5, 6.

<sup>x</sup> Grotius, de J. B. ac P. lib. iii. cap. viii. § 1.

"Les immeubles, les villes, les provinces passent sous la denomination de l'ennemi, qui s'en empare, mais l'acquisition ne s'en consomme, la propriété ne devient stable et parfaite que par le traité de paix, ou par l'entière soumission et extinction de l'état auquel ces provinces appartenaient." (Vattel, *Droit des Gens*, liv. 3, ch. 13, § 197.)

*must be confirmed by the treaty of peace* in order to give it stability, was made the basis of the instructions given by the French government to its plenipotentiary Prince Talleyrand. In his note of the 19th December, 1814, he stated the general principles which, in the opinion of that government, ought to guide the decisions of the congress. "Certainly when the treaty of the 20th May stipulated that the definitive result of the labours of the congress should form a real and permanent balance of power, it did not mean to sacrifice to the establishment of this balance the rights it was intended to secure; it did not intend to throw into a common mass all territories and all nations, to be afterwards divided in certain proportions. It intended that every legitimate dynasty should be preserved or restored, that every legitimate right should be respected, and that the vacant territories, that is to say those destitute of sovereigns, should be distributed according to the principles of the political balance, or what is the same thing, according to the conservative principles of the rights of each, and of the repose of all.

"It would moreover be a strange error to consider as the only elements of this balance those quantities which are computed by political arithmeticians. 'Athens,' says Montesquieu, 'possessed the same internal forces when she reigned with such glory and when she served with such shame. She had twenty thousand citizens, when she defended the Greeks against the Persians, when she disputed the supremacy with Lacedemon, and when she attacked Sicily; she had still twenty thousand when Demetrius Phalareus counted them as slaves in a market exposed for sale.' The balance of power would therefore be a vain word, if we lay out of the case, not that ephemeral and deceptive form produced by the passions, but that true moral force which consists in justice, which, as between nation and nation, constitutes the first of virtues.

"Penetrated with these principles, the king has prescribed as an invariable rule for his ambassadors, to in-



quire first what justice prescribes, and never to depart from this rule in any case, or for any consideration whatsoever: not to subscribe to, or acquiesce in any arrangement contrary to it; and among possible, legitimate combinations to choose those which may most efficaciously contribute to the establishment and maintenance of a true balance of power.

“Of all the questions to be discussed at the congress, the king would have considered that of Poland as the first, the greatest, the most eminently European, and beyond comparison the most important of all, if it were possible to hope, as much as he desired, that a people so worthy of interesting all others by its antiquity, its valour, the services it had formerly rendered to Europe, and by its misfortunes, could be restored to its ancient and perfect independence. The partition, by which Poland was erased from the list of nations, was the prelude, partly the cause, and perhaps, to a certain extent, the excuse, for the violent changes to which Europe has been subjected; but when the force of circumstances, prevailing against the most noble and the most generous inclinations of the sovereigns to whom the former Polish provinces are subject, has reduced the question of Poland to a mere affair of partition and boundaries which the three powers interested have discussed with each other, and to which preceding treaties made France a stranger, nothing more is left for her, after having offered to sustain the most equitable claims, than to desire the three powers to be satisfied, and to be so herself.

“The question of Poland can thus no longer have, either for France or for Europe, that preëminence to which it would have been entitled in a different state of things; and the question of Saxony has become the most important of all; because there remains no other question, where the two principles of legitimacy and the balance of power are both involved to the same extent, as in the disposition proposed to be made of this kingdom.

“In order to establish the legitimacy of this disposition

it must be shown that kings can be lawfully subjected to judicature in any case, and especially that they can be judged by those who seek to deprive them of their possessions; that they can be condemned without having been heard; and that their families and subjects are necessarily involved in the sentence of condemnation pronounced against them.

“It must be shown that

The principle of confiscation, which the most enlightened nations have banished from their municipal codes, ought to be incorporated into the general law of Europe, as if the confiscation of a kingdom were less odious than that of the humblest cottage.

“It must be shown that

Nations have no rights distinct from their sovereigns, and may be likened to flocks and herds attached to the glebe; that sovereignty is acquired and lost by the mere fact of conquest; that the nations of Europe are united to each other by no other moral ties than those which unite *them* to the islanders of the Pacific; that they live among each other under the mere law of nature, and that what is called the public law of Europe does not exist; since although all the civil societies of the earth are, wholly or partially, governed by usages which constitute laws, the customs which are established between the nations of Europe, and which they have universally, constantly, and reciprocally observed for three centuries, do not form a law for them; in one word, that there is no other law but that of force.”

The note then proceeded to state that the annexation of the entire kingdom of Saxony to Prussia would be fatal to the balance of power in Europe, which mainly consisted in the relative reciprocal forces of aggression and of resistance of its different states. A force of aggression against Bohemia would be thus created, menacing the general security of Austria, and rendering it necessary to increase her

force of resistance in Bohemia, which would proportionally diminish her weight in the general balance of Europe.<sup>1</sup>

In a certain stage of these discussions it was proposed, on the part of Prussia, to indemnify the King of Saxony for the loss of his hereditary dominions, by the cession of the territories lying between the left bank of the Rhine, and the Moselle, the Sarre, and the Meuse. The able French negotiator has been reproached, as for a political fault, with not having accepted this offer, which would have established between the Sarre and the Rhine a feeble and friendly sovereign, instead of a rival military power of the first order; which would have placed the latter on the flanks of Bohemia instead of the most vulnerable frontier of France; and would have augmented the rivalry of Prussia with Austria in Germany by multiplying their points of contact, whilst it would have facilitated the friendly relations of the former with France by removing the frontiers of the two countries from direct contact.<sup>2</sup>

It is certainly true that the principle of legitimacy was equally violated in its essence and spirit by the dismemberment of the ancient state of Saxony without the consent of its sovereign, as it would have been by the incorporation of his entire dominions in the Prussian monarchy. But it must not be forgotten that Austria constantly opposed this incorporation, and insisted upon a fragment, at least, of the Saxon territory being interposed between her possessions and those of Prussia. She too, preferred a weak and inoffensive neighbour on the upper Elbe to the alternative of coming in contact with her ancient enemy and constant rival along the Bohemian frontier. The question of Saxony was consequently terminated by a sort of compromise be-

<sup>1</sup> Klüber, *Acten des Wiener Congresses*, vii. B'd, § 48.

<sup>2</sup> Mignet, *Notice historique sur la vie et les travaux de M. le Prince de Talleyrand*, lue à la séance publique du 11 Mai, 1839, de l'Académie des sciences morales et politiques.

tween the extreme pretensions urged on both sides. The reconstruction of the Prussian monarchy upon a scale proportioned to that occupied by Prussia previous to the war of 1806, was effected by the dismemberment of Saxony, and the annexation to Prussia of a portion of the Saxon territory, with the countries on the Rhine formerly constituting the ecclesiastical electorates, and certain other vacant districts.<sup>a</sup>

The difficulties attending the joint question of Poland and Saxony at one time threatened to dissolve the congress, and actually produced a secret separate alliance between Austria, France, and Great Britain, signed at Vienna on the 3d February, 1815, directed against the pretensions of Russia and Prussia.<sup>b</sup>

Previous to the signature of this treaty, Lord Castlereagh had already relaxed the apparent sternness of his opposition to the views of Russia upon the grand duchy of Warsaw. In a note presented, on the 12th of January, 1815, to the committee of Poland and Saxony, the British minister stated, that without renouncing his former representations, he would now limit himself to expressing the hope that none of the evils he had anticipated would result to the tranquility of the north and the general balance of power from the measures contemplated by Russia, but that in order to obviate as much as possible these consequences, it was important to found the public tranquility in the territories formerly belonging to Poland upon a liberal basis of common interest, by applying to all the people embraced within its former limits, however various might be their political institutions, a system of administration in accordance with their national feelings. Experience had proved that it was not by disregarding all their national usages and

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<sup>a</sup> Schoell, *Histoire abrégée des Traités de Paix*, tom. xi. pp. 32-87, 116-164.

<sup>b</sup> Klüber, ix B'd, § 177.

customs, that the happiness of the Poles and the tranquility of this important part of Europe could be secured. Such a policy was only adapted to excite a sentiment of discontent and self degradation, to provoke troubles, and awaken the recollection of past misfortunes. He therefore earnestly pressed the sovereigns, to whom the destinies of the Polish nation were confided to engage to treat *as Poles*, under whatever form of political institution they might think proper to govern them, those portions of this nation placed under their respective sovereignties. The knowledge of such a determination would tend to conciliate the public sentiment in favour of government, would honour the sovereigns in the eyes of their Polish subjects, and would render them peaceable and contented. If this object were secured, the British government would no longer have to apprehend the dangers, which might result to the liberties of Europe from the union of Poland with the more powerful monarchy of Russia, a danger which would not prove imaginary, if the military forces of the two countries should hereafter be directed by an ambitious and warlike prince.

These views were reciprocated by the Russian plenipotentiaries, Counts Nessebrode and Rasoumoffsky, in their answer to this note, stating that they were entirely in accordance with what the Emperor Alexander had proposed to his allies in order to improve the lot of the Poles, so far as the desire of protecting their nationality could be conciliated with a just balance among the European powers, which was to be re-established by a new division of their respective forces. The impossibility of restoring the ancient system of Europe, with the whole of its primitive combinations, of which the independence of Poland constituted a part, being manifest, the Emperor was compelled to limit his solicitude in favour of the Polish nation to the desire of procuring for the respective Polish subjects of the three powers a mode of existence which might satisfy their legitimate wishes, and secure to them all the advantages

compatible with the particular convenience of each state under whose dominion they were placed.

Prince Hardenberg declared, in a note dated the 30th January, that the principles announced by Great Britain respecting the manner of administering the Polish provinces were entirely consistent with the views of his Prussian majesty, and that he would always endeavour to procure for his Polish subjects all those advantages they might reasonably desire, and which should be compatible with the relations of his monarchy, and the primary object of every state, that of forming a solid whole of the different parts of which it is composed.

The Austrian plenipotentiaries also communicated a declaration, that the Emperor Francis would have been entirely satisfied to have contributed, even by the greatest sacrifices, to the salutary reestablishment of the ancient order of things connected with a kingdom of Poland restored to its national government. Austria had, at no time, seen in free and independent Poland a rival and hostile power; and the principles which had guided the august predecessors of the Emperor had only yielded, at the period of the partitions of 1773 and 1795, to a combination of imperious circumstances, independent of the will of the Austrian sovereigns. The Emperor, being again compelled to yield his views in favour of the independence of Poland to the overruling considerations, which had induced the great powers to consent to the annexation of the greater part of the grand duchy of Warsaw to the dominions of the Russian empire, fully participated in the liberal intentions of the Emperor Alexander in respect to the national institutions he intended to confer on the Polish people. The declaration concluded with expressing the entire concurrence of the Emperor of Austria, in the views expressed by the British government respecting the future lot of that people.<sup>c</sup>

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<sup>c</sup> Klüber, *Acten des Wiener Congresses*, 9 B'd, §§ 40-51.

Such were the circumstances, and such the declarations, under which the partition of Poland was ultimately confirmed by the congress of Vienna, upon the conditions which are stipulated in the final act of the 9th June, 1815.<sup>4</sup>

In pursuance of these stipulations, the Emperor Alexander granted a constitutional charter to the kingdom of Poland on the 15th (27th) November, 1815. By the provisions of this charter, the kingdom of Poland was declared

4 " Art. 1. Le Duché de Varsovie, à l'exception des provinces et districts dont il a été autrement disposés dans les articles suivans, est réuni à l'Empire de Russie. Il y sera lié irrévocablement par sa constitution, pour être possédé par sa Majesté l'Empereur de toutes les Russies, ses héritiers et ses successeurs à perpétuité. Sa Majesté Impériale se réserve de donner à cet état, jouissant d'une administration distincte, l'extension intérieure qu'elle jugera convenable. Elle prendra, avec ses autres titres, celui de Czar, Roi de Pologne, conformément au protocole unifié et consacré pour les titres attachés à ses autres possessions.

" Les Polonais sujets respectifs de la Russie, de l'Autriche, et de la Prusse, obtiendront une représentation et des institutions nationales, réglées d'après le mode d'existence politique que chacun des gouvernemens auxquels ils appartiennent jugera convenable de leur accorder."

" Art. 6. La ville de Cracovie avec son territoire est déclarée à perpétuité citée libre, indépendante, et strictement neutre, sous la protection de la Russie, de l'Autriche et de la Prusse.

" Art. 9. Les cours de Russie, d'Autriche, et de la Prusse, s'engagent à respecter et à faire respecter, en tout temps, la neutralité de la ville libre de Cracovie et de son territoire ; aucune force armée ne pourra jamais y être introduite sur quelque prétexte que ce soit.

" En revanche il est entendu et expressément stipulé, qu'il ne pourra être accordé dans la ville libre et sur le territoire de Cracovie aucun asyle ou protection à des transfuges, déserteurs, ou gens poursuivis par la loi, appartenant aux pays de l'une ou de l'autre des hautes Puissances susdites, et que sous la demande d'extradition qui pourra en être faite par les autorités compétentes, de tels individus seront arrêtés et livrés, sans délai, sous bonne escorte, à la garde, qui sera chargée de les recevoir à la frontière.

" Art. 10. Les dispositions sur la constitution de la ville libre de Cracovie, sur l'Académie de cette ville, et sur l'Evêché et le Chapitre de Cracovie, telles qu'elles se trouvent énoncées dans les articles vii, xv, xvi, et xvii du traité additionnel relatif à Cracovie annexé au présent traité général, auront la même force et valeur que si elles étaient textuellement insérées dans cet acte."

to be united to the Russian empire by its constitution ; the sovereign authority in Poland was to be exercised only in conformity therewith ; the coronation of the king of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. The Polish nation was to have a perpetual representation, composed of the king and the two chambers forming the diet, in which body the legislative power was to be vested, including that of taxation. A distinct Polish national army, and coinage, and distinct military orders were to be preserved in the kingdom.

\* In consequence of the Polish revolution of 1830, and the subsequent re-conquest of the kingdom, a manifesto was issued by the Emperor Nicholas on the 14th (26th) February 1832, establishing an organic statute for the kingdom of Poland, by which it was declared to be perpetually united to the Russian empire, and to form an integral part thereof. The coronation of the Emperor of Russia and King of Poland hereafter to take place at Moscow. The Polish diet to be abolished, and the army of the Russian empire and that of the kingdom of Poland to form a single army, without distinction of Russian and Polish troops. Poland to be separately administered, by a governor general and council of administration appointed by the Emperor, with its distinct civil and criminal code, subject to alteration by laws and ordinances prepared in the Polish council of state, and subsequently examined and confirmed in the section of the council of state of the Russian empire called *the section for the affairs of Poland*. Consultative provincial states to be established, to deliberate upon such affairs concerning the general interests of the kingdom of Poland as shall be submitted to their consideration. Assemblies of nobles, communal assemblies, and councils of waivodies to be continued as formerly.\*

Manifesto of the Emperor Nicholas of 1832, annexing the kingdom of Poland to the Russian empire.

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\* *Annuaire Historique*, 1832, *Documents Historiques*, p. 184



This measure of the Russian government became the object of severe animadversion in the British parliament and the French chambers. The cabinets of France and Great Britain protested against it, as an infraction of the spirit, if not the letter of the treaties of Vienna. Without deviating from the object of this work, which is historical and not polemic, it may be observed, that in the deliberations of the congress, as we have already seen, these two powers avowedly wished to restore the national existence of Poland, with the same extent of territory it possessed previous to the first partition of 1772; Austria professed herself not unwilling to sacrifice her share of the dismembered provinces, declaring that she had reluctantly received them as an equivalent for the inevitable aggrandizement of the other two partitioning powers, and in order to maintain the relative equilibrium between the three; and Prussia might, perhaps, have been induced to consent to a similar sacrifice for adequate equivalents, which would have rendered her disinterested in the question. On the other hand, Russia, far from being disposed to relinquish Lithuania and the other Polish provinces annexed to her empire at the first and second partitions, claimed the permanent possession of the duchy of Warsaw as acquired by right of conquest. Under these circumstances, France and Great Britain were induced to consent to relinquish the absolute restoration of ancient Poland, in return for the creation of the kingdom of that name, to be possessed by the sovereign of Russia under a title distinct from his imperial crown, to be connected with the Russian empire by its constitution, and governed by its separate laws and administration with the capacity of being extended internally (i. e. towards Russia proper,) by the addition of the other Polish provinces which had been previously incorporated into the empire; in return for the stipulations in favour of those provinces, and of the Polish subjects of Austria and Prussia, granting to them a representation and distinct national institutions; in return for the acknowledgment of the independence of the free city of

Cracow, the ancient capital of the kingdom of Poland ; and in return for the stipulations in favour of the free navigation of the rivers and canals, the use of the sea-ports, and the free circulation of the productions of the national soil and industry throughout the whole extent of ancient Poland.

All these stipulations combined were the equivalent for the sanction by Europe of the final partition of ancient Poland implied in the treaties of Vienna. Supposing then that any of the parties to those treaties really intended to reserve to the Polish nation the consoling hope of ultimate restoration, and at the same time to secure to them distinct institutions and privileges as a compensation for the temporary loss of their national independence, and to prevent their being entirely absorbed in the partitioning states, the question recur has this intention been adequately expressed in the text of those treaties ; and if so, have they failed of their effect in consequence of the Polish revolution of 1830 ?

Such is the intrinsic imperfection of all human language that it frequently becomes impossible from the mere words alone of any written instrument to ascertain the meaning of the parties. When to this intrinsic defect of every known tongue is superadded that studied ambiguity, which almost justifies the maxim of a celebrated statesman, an active agent in these transactions, that "language was given to man to conceal his thoughts," it becomes still more difficult to ascertain the real meaning of words selected to express the result of a compromise between opposite and almost irreconcilable interests and views. Without pretending more minutely to scrutinize the various motives which may have influenced the different parties to these arrangements, it must be admitted that nothing is more difficult than to maintain and regulate the relations between a sovereign empire, and a dependant or even a co-ordinate state, by means of foreign interference which must always assume a character offensive to the superior government. Has then the intention of the contracting parties to the treaties of Vienna been expressed with sufficient clearness and

precision in this respect, to justify the interference of any of these parties, for the purpose of insisting on the execution of the stipulations in favour of Poland ? If this intention has been inadequately expressed in the letter of the treaties, it must be sought for in the spirit by which the stipulations were dictated ; which, as already observed, was that of a compromise among the conflicting views of all the parties. If this compromise has failed of its effect in consequence of the Polish revolution of 1830, and the subsequent re-conquest of the kingdom of Poland by Russia, then the parties to the stipulations in question, who seek to avoid the consequences of these events, must go behind the treaties, and reverting to the original idea of a complete restoration of Polish independence and nationality, must seek to realize that idea by means which are adequate to the end, by remodelling those stipulations so as to guaranty the existence of Poland as a state independent of any connection with other powers.

In the debate, which took place in the British house of commons on this subject, June 28th, 1832, it was stated by Mr. Cutlar Fergusson, that the stipulations in the treaties of Vienna were two-fold, first as respects the Polish provinces not included in the duchy of Warsaw, and secondly those which related to the duchy itself, which was to be erected into a kingdom with certain additions of territory.

As to the first, the stipulations related not merely to the Polish provinces subject to Austria and Prussia, but to those of Lithuania, Volhinia, Podolia and the Ukraine, united to Russia at the first partition of 1772. These provinces it was once the intention of the Emperor Alexander to have added, in whole or in part, to the kingdom of Poland ; but so much was that kingdom considered a creation of the congress of Vienna, that it was thought necessary to reserve to the Emperor of Russia a power of adding to that kingdom ; and the territorial extension contemplated by the treaty of Vienna was to be found in the Polish provinces

previously subject to Russia, to which in the mean time a representation and national institutions were to be given. The grant of this representation and these national institutions to those provinces was an express stipulation, binding on the Emperor Alexander, and matter of compact between him and the other powers parties to the treaty of Vienna, and which they had a right to see, and ought to have seen carried into execution by that prince. But, so far from this being the case, it appeared that although some most imperfect institutions had been given by Austria to the province of Galicia, and by Prussia to the grand duchy of Posen, not only had no national institutions or representation of any kind been given to the other parts of the Polish territory, but their ancient institutions, which, to a certain degree, afforded security to life and liberty, had been wrested from them.

The subject, however, which was first in order, and must form the main topic of deliberation, was the provision, by which the duchy of Warsaw was erected into a kingdom, and was conferred upon the Emperor of Russia<sup>1</sup> subject to certain conditions, upon which only he received the sovereignty of Poland from the hands of the congress of Vienna. Nor was there any thing vague, ambiguous, or uncertain in the terms of the treaty. The house would remark the difference in the provisions of the treaty, with respect to the Polish provinces which were previously subject to Russia, and those which respected the kingdom of Poland conferred upon that state. By the treaty itself the Polish provinces were to have a representation and national institutions : but the duchy of Warsaw, erected into a kingdom, was to have, not merely a representation, not merely national institutions, but a constitution, by which the new kingdom was to be irrevocably bound, and without which constitution it was not, and could not be bound to the Emperor of Russia. It was the indispensable condition of rule over that country by the Emperor of Russia—the constitutional king of Poland—Poland, not a province, like

those that were to have a representation and national institutions merely, but a kingdom and a state, enjoying a distinct administration, to which the Emperor might give such territorial extension internally as he thought fit. Poland was made over to the Emperor of Russia ; not to form an integral part of his dominions,—not to be at his will converted into a province of Russia ; but on the express condition that it was to be irrevocably bound to his empire, by its constitution, and by no other tie. But even if the terms were vague and uncertain, who so fit to explain and clear them up as the Emperor Alexander himself? The words used in his speech on the opening of the diet in March, 1818, would show the terms on which he considered that he held the sovereignty of Poland. In this speech he said : “ Your restoration is defined by solemn treaties : it is sanctioned by the constitutional charter. The inviolability of the external engagements, and of the fundamental law, assures, henceforward, to Poland an honourable rank among the nations of Europe.”

The speaker then went on to show that the constitutional charter, thus granted by the Emperor Alexander, had been violated by him, and his successor the Emperor Nicholas, in every one of its leading provisions ; and was in fact wholly subverted and destroyed by the authority of the monarchs, who had solemnly sworn to preserve and maintain it. The resistance of the Polish nation in 1830, was, therefore, justifiable, if the resistance of the English nation was justifiable at the revolution of 1688. But, even if he were to admit that the Polish insurrection was an unjustifiable rebellion, it could not be a reason for depriving a whole nation of its liberties. The Emperor Nicholas did not charge the whole nation with rebellion. He stated it to have been the work of a faction who had seduced a portion of his subjects from their allegiance. And he (the speaker) had already admitted that those who took part in the insurrection exposed themselves to the consequences of its fail-

ure, but the constitution of Poland and the rights of the nation continued as before.

Most of the other speakers concurred in these views ; and the minister for foreign affairs, Lord Palmerston, consented to the production of the papers moved for ; at the same time, stating that with reference to all the interests concerned, and on every account, he should best discharge his duty, by not entering into any discussion, or explanation of the conduct of the British government, in respect to these transactions. At the same time, he was bound in justice to add that the government was not blind to the rights conferred upon Great Britain by the treaty of Vienna. No man could entertain a doubt that she possessed a full right to express a decided opinion upon the performance or non-performance of the stipulations contained in that treaty. Nevertheless it could not be denied that England lay under no peculiar obligation, independent of the other contracting parties, to adopt measures of direct interference by force.<sup>f</sup>

Treaty of Vienna relating to Cracow.

The stipulations in the treaties of Vienna, relating to the free and independent town of Cracow, have also frequently become the subject of debate in the British parliament and the French chambers, in consequence of the interference of the three protecting powers, and the occupation of that town by the Austrian troops, under their sanction, in 1836. Cracow belonged, at the time of the congress of Vienna to the duchy of Warsaw ; but had been subject to Austria, during the whole period, which elapsed from the third partition of Poland in 1795, until the peace of Vienna between France and Austria in 1809, when it was annexed to the duchy. The congress declared it to be a free, independent, and neutral city, under the joint protection of Austria, Russia, and Prussia, with a territory of 51,000 square miles on the left bank of the Vistula and a population of 110,000. It is said that Austria obtained a confidential as-

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<sup>f</sup> Hansard's Parliamentary Debates, vol. xiii. p. 1115.

surance from Russia that she would never post a body of troops in that part of the kingdom of Poland which lies beyond the Nidda, a small river flowing in the Vistula ; whilst Austria on her part expressly granted to the riparian town of Podgorze (opposite to Cracow and belonging to Austria) the privileges of a free trading town in perpetuity, and stipulated never to form any military establishment which might threaten the neutrality of Cracow. By the final act of the congress, as we have already seen, the three protecting powers expressly stipulate to respect, and cause to be respected forever, the neutrality of the town and its territory. No foreign troops can be introduced into it under any pretext whatsoever. It is, on the other hand, reciprocally stipulated, that no asylum or protection should be afforded, in the town and territory of Cracow, to fugitives from justice or deserters belonging to the territories of either of the three protecting powers ; but that such fugitives from justice and deserters should be arrested on the demand of the competent authorities and sent, without delay, under a sufficient escort in order to be delivered up to the guard authorized to receive them on the frontier.<sup>c</sup> By the additional treaty relating to Cracow between the three powers, annexed to the general treaty, certain dispositions respecting the constitution of the city, its university, and the bishopric and chapter of Cracow were adopted, which are declared by the final act of the congress to have the same force and value as if textually inserted therein.<sup>d</sup>

According to the 4th article of the constitution thus guaranteed to Cracow, the directing senate was composed of twelve senators ; of which six were to be chosen for life, and six for the term of seven years. One senator in each of these classes was to be chosen by the chapter ; one by the university, and four by the representatives of the peo-

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<sup>c</sup> Act Final, art. 6-9.

<sup>d</sup> Act Final, art. 10.

ple. The representatives of the people were to assemble every three years, in the month of December, to deliberate upon the laws proposed by the senate. A fundamental change in this constitution, made in consequence of the interference of the protecting powers, was published by the senate on the 23d March, 1833, by which that body was reduced to the number of eight, four for life, and four for the term of seven years.

The 27th article of this new constitution provided, that in case of difference arising either between the senate and the chamber of representatives, or between the members of these two bodies, upon the extent of their respective powers, or upon the interpretation of the constitution, the residents of the three protecting courts, assembled in conference, should decide the question.

The ancient statutes of the university were also annulled and superseded by the new organic statute of the 15th August, 1833, which deprived the government of the republic of the right of appointing the professors, and conferred it on the protecting courts.

During the Polish insurrection of 1830-31, the town and territory of Cracow were temporarily occupied by the Russian forces; and in 1836, they were again occupied by Austrian troops, under the sanction of the other two protecting powers. The ground, upon which this last mentioned occupation was justified upon the part of the three powers, was the non-fulfillment of the stipulation in the treaty of Vienna against the harbouring of deserters and fugitives from justice in the town of Cracow; and the allegation that the territory of the republic had become the focus of plots and conspiracies against the security of the neighbouring governments. In the debate which took place in the house of commons on the 18th March, 1836, on the motion of Sir Stratford Canning, it was stated by the minister of foreign affairs, Lord Palmerston, that he did not see any sufficient justification of the violent measures which had been adopted against Cracow, a state whose in-



dependence it was of as much importance that Great Britain should see was not causelessly and wantonly disturbed, as if the case were that of Prussia or any other powerful nation. In the more recent debate which took place on the 13th of March, 1840, Sir Stratford Canning observed, that the first occupation in 1830, took place under circumstances which though not giving, strictly speaking, the right to interfere, yet might still afford some shadow of excuse for the violation of the treaty of Vienna. The time of the former occupation was small, two months only; the second occupation had been continued for the last four years, notwithstanding the assurances which had been given that it should be temporary. It was not confined to the mere suppression of military authority in that city. Many civil and political changes had been made, and whilst the forms of a free constitution had been preserved, the supreme power was in fact exercised by the resident representatives of the three great powers. The constitution had been completely changed, the new functionaries had introduced the most arbitrary enactments, substituting their own act in the place of those of the constituted authorities. The police was placed under the controul of Austria, and every functionary was appointed by the conference itself. The whole system of free trade, which had previously existed, was discontinued. In his reply, Lord Palmerston stated, that the grounds, on which the three powers had justified the occupation, were deemed by the British government inconsistent with the stipulations of the treaty of Vienna, to which both France and Great Britain were parties. The British government had accordingly protested against it. But it was one thing to express an opinion, and another to adopt hostile proceedings to compel the three powers to undo what they had done; and there were particular local circumstances, which prevented Great Britain from enforcing her views, except by war; because Cracow was a place inaccessible to the direct action of that country. But when he stated these facts and this protest, it would be but fair

that they should bear in mind the peculiar state of Europe immediately before the time of this occupation. A great revolution had taken place in France, followed by another in Belgium, which had led to the separation of that country from Holland. There had been a mighty effort on the part of the Poles to recover what they considered their rights from Russia. The three powers were greatly alarmed at these demonstrations. Each had in its possession some portion of that territory which had formerly been part of Poland; and their passions, or their fears, might, at that time, have, in some measure obscured that judgment, which in calmer moments they might have entertained respecting this question. These seemed to him reasons why they might indulge the hope, that under the altered state of Europe, the three powers might now be induced to take a kinder view of the matter. The British government had, for some time past, endeavoured to urge upon Austria the necessity of withdrawing the occupation which had been established for temporary purposes only; and the answer which had been given was, that this recommendation would be adopted, and that the Austrian government was only waiting for some arrangements to be made with regard to the military force and for the result of certain pending trials. The Austrian government had assured the British government that no permanent occupation was intended, and the only question which remained between the two governments was one of time.<sup>1</sup>

The ancient Germanic constitution, as established by the peace of Westphalia, had been completely subverted by the wars of the French revolution. Its minor princes and states had been mediatized, and secularized, after the peace of Luneville, in 1803, and in consequence of the formation of the confederation of the Rhine, under the protec-

§ 13. Formation of the Germanic confederation.

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<sup>1</sup> Mirror of Parliament, 18 March, 1836. London Morning Chronicle, 14 July, 1840. The city of Cracow has been since evacuated by the Austrian troops.

torate of the Emperor Napoleon, in 1806. The Emperor Francis had renounced, in the same year, the elective crown of Germany, and assumed the title of hereditary Emperor of Austria. The former free imperial towns had been merged in the territories of the respective states by which they were *enclavés*, with the exception of the remaining Hanseatic cities of Hamburg, Bremen and Lübeck, and the free town of Frankfort. The number of independent princes and states of Germany had been thus reduced, from three hundred and fifty-five to thirty-eight. These fundamental changes, produced by so many wars, and revolutions, and treaties, rendered it obviously impossible to restore the Germanic empire on its ancient foundations.

The sixth article of the treaty of Paris, 1814, had stipulated that "the states of Germany should be independent and united by a federal league."<sup>k</sup> At the congress, a committee was formed to draw up a constitution for the new confederacy, called the Germanic committee, and consisting of the representatives of the crowned heads of Germany, Austria, Prussia, Bavaria, Hanover, and Wurtemberg; Saxony being excluded by the fact that the king was still a prisoner, and the fate of the kingdom not yet decided. The other sovereign princes and states, who had also been excluded from the deliberations of this committee, demanded that *all* the states of Germany should be admitted "to participate in the formation of a compact which could only derive its binding force from the consent of all." This demand was, in the first instance, rejected, upon the ground that the admission of the states of the second order would lead to interminable delays, and that they had previously given their assent to such measures as might be required for the reëstablishment of the liberties of Germany.

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<sup>k</sup> "Les états de l'Allemagne seront indépendans et unis par un lien fédératif."

In the discussions of the Germanic committee, the plan of a federal constitution, which had been agreed upon by Austria and Prussia, and accepted by Hanover, encountered decided opposition on the part of Bavaria and Wurtemberg. This opposition turned,

*First.* Upon the article which prohibited any state, *not having possessions out of Germany*, from making alliances or war with any foreign power, without the consent of the confederation.

The Prince de Wrede observed, on the part of Bavaria, that even repudiating the principle that one state should have a right to make war against another state of the confederation, the question whether it should retain that right, as well as that of forming alliances with powers foreign to Germany, might depend upon a consideration of the geographical position of each state, creating distinct duties growing out of the necessity of self preservation. Bavaria, for example, ought to be left free to act, in case of a war in Italy, between Austria and France, in favour of the former, without waiting for the consent of the confederation. This restriction would also have the effect of diminishing the political consideration of those states whose possessions were confined to Germany.

To this objection it was replied, on the part of Austria, Prussia, and Hanover, that the tranquility of Germany, as a great body of federal states interposed between France and Russia, could only be secured by adopting the proposed principle, by which its neutrality would be maintained in every war foreign to its interests. The ancient constitution of the empire, as practically interpreted, was vicious in this respect, since it left the states of Germany at liberty to make war upon each other. The same spectacle would again be exhibited if, for example, in the wars which might be waged in Italy, between Austria and France, one state of the Germanic confederation could ally itself with the first of these powers, and another with the second.

The article was finally adopted in the following form :

“ Art. XI. The states of the confederation bind themselves to defend, not only the whole of Germany, but also each individual state of the union, in case it should be attacked, and mutually guaranty all their possessions included in this union.

“ When war is declared by the confederation, no member can engage in separate negotiations with the enemy, nor make peace, or a truce, without the consent of the others.

“ The members of the confederation, whilst reserving to themselves the right of forming alliances, bind themselves not to contract any engagement which shall be directed against the security of the confederation, or of the individual states of which it is composed.

“ The confederated states bind themselves not to make war against each other, under any pretext, and not to prosecute their controversies by force of arms, but to submit them to the diet.”<sup>1</sup>

*Secondly.* The proposed plan of a federal compact declared that a constitution of states should be established in each country of the confederation, and fixed a *minimum* of the rights which should devolve on the states, leaving to the sovereign members of the confederation the right of granting a greater extent of powers to the chambers to be organized according to the peculiar customs or character of the people.

The King of Bavaria objected to this article, giving the federal authority the right of interfering between a sovereign and his subjects, by fixing the *minimum* of concessions which the former should make to the latter. The King of Wurtemberg required that the whole matter should be left to the discretion of the local sovereign.

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<sup>1</sup> Acte final, art. 63.

This discrepancy between the views of these two courts, and the authors of the plan of a federal constitution, is explained by the fact that the King of Bavaria had already spontaneously granted to his people a constitution, whilst the King of Wurtemberg had annulled that which he found in existence on his accession to the throne.

The plenipotentiary of Hanover presented to the German committee, on the 21st October, a note stating that his sovereign, the Prince Regent of Great Britain, could not admit that the changes, which had taken place in Germany since the revolution, had given to the Kings of Bavaria and Wurtemberg the absolute right of sovereignty over their subjects; or that the destruction of the constitution of the Germanic empire drew after it, as a legal consequence, the destruction of the local constitutions of its different members, except so far as related exclusively to their federal relations.

That a representative system had existed in Germany, of right, from time immemorial; that in several states its organization rested upon special compacts between the prince and his subjects; and that even in those countries where these local constitutions had ceased to exist, the subjects still continued to enjoy important rights established and protected by the laws of the empire.

That it could not be maintained that the conventions and treaties between Napoleon and the German princes could prejudice the rights of their subjects; these rights not being the proper objects of such compacts.

That even the act of the confederation of the Rhine, far from according a despotic power to the sovereign members of that league, limited their authority in several essential points.

Neither could it be maintained that the treaties subsequently concluded with the allied powers, in which the latter had guaranteed the rights of sovereignty of the princes adhering to the general league, were intended to confirm, or could confirm, rights which they had not before lawfully

possessed, since the rights were not the subject matter of those treaties; and the word *sovereignty* did not express the idea of despotic power, the King of Great Britain being as sovereign as any European prince, and the liberties of his people, far from endangering his throne, confirmed its stability.

The Hanoverian minister therefore demanded,

1. That the rights, which from time immemorial had belonged to German subjects should be clearly defined.

2. That the local constitutions founded upon the laws and conventions should be confirmed, subject to necessary modifications.

3. That even if Austria, Prussia, Bavaria, and Wurtemberg, either on account of local circumstances, or on the ground of the treaties alleged, should claim to be exempted from the operation of these provisions; that, in the countries where states had not previously existed, they should be established, with the provision that their consent should be necessary to the levying of taxes and to the enactment of new laws; that they should participate in the appropriation of the public revenues, and should be authorized, in case of malversations, to demand the punishment of the public functionaries.

The Austrian, Prussian, and Bavarian plenipotentiaries adhered to the contents of this note. The minister of Wurtemberg declared himself to be without instructions.

The article was finally adopted in the following terms: "There shall be assemblies of states in all the countries of the confederation."<sup>m</sup>

<sup>m</sup> The article on this subject, as originally proposed, stood as follows in the German language:

"In allen Bundesstaaten *soll* eine landstaendische Verfassung *bestehen*; which may be translated as follows: *In omnibus partibus confederationis constitutio representativa constituitur*. But the Bavarian plenipotentiary opposed the insertion of the future imperative *soll*, and the use of the verb *bestehen*. For the first was substituted the future *wird*, and for the verb

The ministers of the princes and states of the second order were at last admitted to the conferences, and the act of confederation was finally completed and signed on the 8th of June, 1815, by all the contracting parties except Wurtemberg and Baden who subsequently acceded.<sup>a</sup>

By this act, the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly belonged to the German empire, the King of Denmark for the Duchy of Holstein, and the King of the Netherlands for the Grand Duchy of Luxemburg, are united in a perpetual league, under the name of the Germanic Confederation.

The object of this union is declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated states. All the members of the confederation, as such, are entitled to equal rights. New states may be admitted into the union by the unanimous consent of the members.

The affairs of the Union are confided to the diet, which sits at Frankfort on the Mayn, in which the respective states are represented by their ministers, and are entitled to the following votes in what is called the *ordinary assembly* of the diet.

Austria,	.	.	.	.	.	.	.	.	1
Prussia,	.	.	.	.	.	.	.	.	1
Bavaria,	.	.	.	.	.	.	.	.	1
Saxony,	.	.	.	.	.	.	.	.	1
Hanover,	.	.	.	.	.	.	.	.	1
Wurtemberg,	.	.	.	.	.	.	.	.	1
Baden,	.	.	.	.	.	.	.	.	1

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*bestehen* (consistere) the words *statt finden*. So that it now reads: "In allen Bundesstaaten wird eine landständische Verfassung statt finden," which is translated in the final act: "I y aura des assemblées des états dans tous les pays de la confédération." (Acte final, art. 64, sec. 2.)

<sup>a</sup> Schoell, *Histoire des Traités de Paix*, tom. xi. pp. 273-287.



Electoral Hesse, . . . . .	1
Grand Duchy of Hesse, . . . . .	1
Denmark (for Holstein,) . . . . .	1
Netherlands (for Luxemburg,) . . . . .	1
Grand Ducal and Ducal Houses of Saxony, . . . . .	1
Brunswick and Nassau, . . . . .	1
Mecklemburg-Schwerin and Strelitz, . . . . .	1
Oldenburg, Anhalt, and Schwartzburg, . . . . .	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck and Hesse Hom- burg . . . . .	1
The free towns of Lubeck, Frankfort, Bre- men and Hamburg . . . . .	1

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Total 17.

Austria presides in the diet, but each member has a right to propose any measure for deliberation.

The diet is formed into what is called a *General Assembly (Plenum)* for the decision of certain specific questions. The votes *in pleno* are distributed as follows :

Austria, Prussia, Saxony, Bavaria, Hanover, Wurtemberg, each four votes, . . . . .	24
Baden, Electoral Hesse, Grand Duchy of Hesse, Holstein, Luxemburg, each three votes, . . . . .	15
Brunswick, Mecklemburg - Schwerin, and Nassau, each two votes, . . . . .	6
Saxe-Weimar, Gotha, Coburg, Meiningen, Hil- burghausen, Mecklemburg-Strelitz, Olden- burg, Anhalt-Dessau, Anhalt-Bernburg, An- halt-Cœthen, Schwartzburg-Sondershausen, Schwartzburg-Rudolstadt, Hohenzollern- Hechingen, Lichtenstein, Hohenzollern-Sig- maringen, Waldeck, Reuss, (elder branch), Reuss, (younger branch,) Schaumburg-Lippe,	

Lippe, Hesse-Homburg, Lubeck, Frankfort,  
Bremen, Hamburg, each one vote. . . 25

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Total 70.

Every question to be submitted to the general assembly of the diet is first discussed in the ordinary assembly, where it is decided by a majority of the votes. But in the general assembly, (*in pleno*), two-thirds of all the votes are necessary to a decision. The ordinary assembly determines what subjects are to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the confederation, or organic regulations establishing permanent institutions as means of carrying into effect the declared objects of the union, or the admission of new members, or concerning the affairs of religion, must be submitted to the general assembly; and in all these cases, absolute unanimity is necessary to a final decision.

The diet has power to establish fundamental laws for the confederation, and organic regulations as to its foreign, military, and internal relations.

We have already stated the provisions of the federal act restricting the power of the several members of the union in making war, and entering into treaties of peace and alliance with foreign powers, as well as the stipulation securing to each state of Germany a local constitution.

The subjects of each sovereign member of the union have the right of acquiring and holding real property in any other state of the confederation, of emigrating from one state to another with the consent of the latter; of entering into the military or civil service of any one of the confederated states, subject to the permanent claim of their own native sovereign or state. These subjects are also exempt from every tax or duty (*jus detractus, gabella emigrationis*) on the removal of their effects from one state to another, unless where reciprocal compacts have stipulated to the contrary.

The same article (18) declares that the diet shall have power to establish uniform laws relating to the freedom of the press, and securing to authors the copyright of their works throughout the confederation.

The different Christian sects throughout the confederation are entitled to an equality of civil and political rights; and the diet is empowered to take into consideration the means of ameliorating the civil condition of the Jews, and of securing to them in all the states of the union the full enjoyment of civil rights, upon condition that they submit themselves to all the duties and obligations of other citizens. In the mean time, the privileges granted to them by any particular state, are to be maintained.

The diet has also power to regulate the commercial intercourse between the different states, and the free navigation of the rivers belonging to the confederation according to the general principles established by the treaty of Vienna.<sup>o</sup>

This compact, which is far from containing a complete enumeration of the powers meant to be conferred upon the federal body by its several members, differs, in several material particulars, from the ancient constitution of the Germanic empire with its imperial head, its hierarchy of princes, its electors, its free towns, and its judicial tribunals. The ancient diet was composed of three colleges, each independent of the other; and the assent of the emperor was indispensably necessary to the validity of its decrees. The present diet consists of a collective and sovereign assembly uncontrouled, in theory at least, by any superiour authority. The Germanic confederation, as constituted by the federal act of 1815, does not, however, essentially differ from an ordinary equal alliance between independent sovereign states; except by its permanence, and the greater number and importance of its objects; and

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<sup>o</sup> Martens, Nouveau Recueil, tom. ii. pp. 353-378.

belongs to that class of federal compacts where the sovereignty of each member of the union remains unimpaired, and the resolutions of the federal body are enforced, not as laws directly binding on the individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction.

The extent of the powers conferred on the diet by the federal act of 1815 was more fully defined by an additional act signed at Vienna, on the 15th May, 1820, and ratified by the diet at Frankfort on the 8th of June of the same year. This act also introduced several modifications in the fundamental laws of the confederation, which without essentially altering its theoretical character as an equal league of independent states, established many positive restraints upon their sovereignty, and subjected its exercise in many cases to the superintending authority of the diet.

Additional federal act of Vienna, 1820.

By the terms of this act, the diet may interfere to suppress any rebellion or insurrection, or in case of imminent danger thereof, in any state, as threatening the general safety of the confederation. And it may, in like manner, interfere to suppress such rebellion or insurrection by the common forces of the confederation, if the local government is prevented by the insurgents from making such application, upon the notoriety of the facts of the existence of such insurrection, or imminent danger thereof.

By the fifty-fourth article of the final act of 1820, it is provided, that the diet shall take care that the stipulation contained in the thirteenth article of the federal act of 1815, respecting the establishment of local constitutions of states, shall not remain without effect in any confederated state. But the fifty-fifth article declares, that it belongs exclusively to the sovereign princes of the confederation to regulate this matter in the interest of their respective countries, having regard to the ancient rights of the assemblies of states, as well as to the relations actually existing. Whilst the fifty-sixth article provides, that the constitutions of

states, actually in force, cannot be changed except in a constitutional manner.

By the fifty-seventh and fifty-eighth articles, it is declared, that the Germanic confederation constituting, with the exception of the free towns, a union consisting of sovereign princes, the fundamental principle of this union requires that all the powers of sovereignty should remain united in the supreme head of the government; and that the sovereign cannot, by the local constitution, be required to admit the coöperation of the states except as to the exercise of rights specifically determined. And that no particular constitution can restrain the sovereign confederated princes in the exercise of the duties imposed on them by the federal union.

The sixtieth article provides, that the diet may guaranty the local constitution established in any particular state of the confederation on the application of such state. The diet acquires by this guarantee the right of supporting the constitution on the application of either of the parties interested, and of terminating the differences which may arise upon its interpretation or execution, either by mediation, or by arbitration, unless such constitution shall have provided other means of terminating such differences.

Finally, the fifty-ninth article provides, that in those states of the confederation, where the publicity of debates in the legislative chambers is recognized by the constitution, there shall be established a regulation to prevent the legal bounds of the freedom of opinions being transgressed, either in the debates themselves, or in their publication through the press, in such a manner as to endanger the tranquility of the particular state, or of Germany in general.

The limitations, contained in the federal act of 1815 upon the war-making and treaty-making power of the several members of the confederation, were also more completely defined by the act of 1820; so as effectually to secure, at least so far as treaties and laws can secure, the union of the German nations against the attacks of any

foreign enemy, and at the same time to prevent their becoming the allies of the enemies of each other. In this respect, the present federal constitution more completely fulfils its avowed object than the ancient constitution of the empire, which had ever proved insufficient to provide effectually for the common defence, or to restrain its members from leaguings with foreign powers against their co-states.

By the 35th article of the final act of 1820 it is declared that "the Germanic confederation has the right, as a collective body, to declare war, make peace, and contract alliances, and negotiate treaties of every kind. Nevertheless according to the object of its institution, as declared in the 2d article of the federal act, the confederation can only exercise these rights for its own defence, for the maintenance of the external security of Germany, as well as the independence and inviolability of each of the states of which it is composed.

"Art. 36. The confederated states having engaged, by the 11th article of the federal act, to defend against every attack Germany in its entire extent, and each of its co-states in particular, and reciprocally to guaranty the integrity of their possessions comprised in the union, no one of the confederated states can be injured by a foreign power without at the same time and in the same degree affecting the entire confederation.

"On the other hand, the confederated states bind themselves not to give cause for any provocation on the part of foreign powers, or to exercise any towards them. In case any foreign state shall make a well grounded complaint to the diet of an alleged wrong committed on the part of any member of the confederation, the diet shall require such member to make prompt and satisfactory reparation, and take other necessary measures to prevent the disturbance of the public peace.

"Art. 37. Where differences arise between a foreign power and any state of the confederation, and the inter-

vention of the diet is claimed by the latter, that body shall examine the origin of the controversy and the real state of the question. If it results from this examination that such state has not a just cause of complaint, the diet shall engage such state by the most earnest representations to desist from its pretensions, shall refuse its intervention, and in case of necessity take all proper means for preserving peace. Should the examination prove the contrary, the diet shall employ its good offices in the most efficacious manner in order to secure to the complaining party complete satisfaction and security.

“ Art. 38. Where notice received from any member of the confederation, or other authentic information renders it probable that any of its states, or the entire confederation, are menaced with a hostile attack, the diet shall examine into and pronounce without delay upon the question whether such danger really exists ; and if determined in the affirmative, shall adopt the necessary measures of defence.

This resolution and the consequent measures are determined in the permanent council by a plurality of votes.

“ Art. 39. When the territory of the confederation is actually invaded by a foreign power, the state of war is established by the fact of invasion ; and whatever may be the ultimate decision of the diet, measures of defence, proportioned to the extent of the danger, are to be immediately adopted.

“ Art. 40. In case the confederation is obliged to declare war in form, this declaration must proceed from the general assembly determining by a majority of two-thirds of the votes.

“ Art. 41. The resolution of the permanent council declaring the reality of the danger of a hostile attack renders it the duty of all the confederated states to contribute to the measures of defence ordained by the diet. In like manner, the declaration of war, pronounced in the general assembly of the diet, constitutes all the confederated states active parties to the common war.

“ Art. 42. If the previous question concerning the existence of the danger is decided in the negative by a majority of votes, those of the confederated states who do not concur in the decision of the majority, preserve the right of concerting between themselves measures of common defence.

“ Art. 43. Where the danger and the necessary measures of defence are restricted to certain states only of the confederation, and either of the litigating parties demands the mediation of the diet, the latter body may, if it deems the proposition consistent with the actual state of things, and with its own position, and if the other party consents, accept the mediation ; provided that no prejudice shall result to the prosecution of the general measures for the security of the territory of the confederation, and still less any delay in the execution of those already adopted for that purpose.

“ Art. 44. War being declared each confederated state is at liberty to furnish for the common defence a greater amount of forces than is required as its legal contingent, but this augmentation shall not form the ground of any claim for indemnity against the confederation.

“ Art. 45. Where in case of war between foreign powers, or other circumstances, there is reason to apprehend a violation of the neutral territory of the confederation, the diet shall adopt without delay, in the permanent council, such extraordinary measures as it may deem necessary to maintain this neutrality.

“ Art. 46. Where a confederated state, having possessions without the limit of the confederation, undertakes a war in its character of a European power, the confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto.

“ Art. 47. Where such state finds itself menaced, or attacked, in its possessions not included in the confederation, the latter is not bound to adopt defensive measures, or to take any active part in the war, until the diet has recog-



nized in the permanent council, by a plurality of votes, the existence of a danger threatening the territory of the confederation. In this last case, all the provisions of the preceding articles are equally applicable.

" Art. 48. The provision of the federal act, according to which, when war is declared by the confederation, none of its members can commence separate negotiations with the enemy, nor sign a treaty of peace or armistice, is equally applicable to all the confederated states, whether they possess or not dominions without the territories of the confederation.

" Art. 49. In case of negotiations for the conclusion of a peace or armistice, the diet shall confide the special direction thereof to a select committee named by that body; and shall appoint plenipotentiaries to conduct the negotiations according to instructions, with which they shall be furnished. The acceptance and confirmation of a treaty of peace can only be pronounced in the general assembly.<sup>†</sup>

Decree of the  
Diet at Frank-  
fort, 1832.

The effects of the French revolution of 1830, in its reaction upon the public mind throughout Europe manifested themselves in Germany in popular commotions, which were followed by various reforms in the local constitutions of several states, such as Saxony, Electoral Hesse, and Hanover. In the states of Germany which had already obtained, by the voluntary concession of their sovereigns, representative constitutions, more or less corresponding to the wants and wishes of the people, the legislative chambers assumed an attitude, and a tone of discussion, which had been unknown since the repressive measures adopted under the additional powers given to the diet by the final act of the confederation of 1820. The liberty of the press, which was still tolerated to a certain extent in some of the minor states, was freely used to arraign the German governments before the tribunal of public opinion, to demand further

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<sup>†</sup> Martens, *Nouveau Recueil*, tom. v. pp. 467-501.

concessions in favour of popular rights, and in some instances to excite popular commotions. The diet, at first, contented itself with exercising its acknowledged powers, by specific measures for suppressing the publication of certain offensive newspapers. But these measures proving insufficient, in the opinion of the Austrian and Prussian cabinets, to check the rapid progress of the revolutionary spirit, a decree was adopted by the diet on the 28th June, 1832, on the motion of Austria seconded by Prussia, by which very important modifications were introduced into the fundamental laws of the confederation established in 1815 and 1820.

The motives for adopting this decree were stated by the president, Count Münch-Bellinghausen, to arise out of circumstances, partly beyond the reach of the authority and influence of the German governments, (alluding doubtless to the consequences of the French revolution of 1830,) producing a state of things which had excited the attention of his majesty the Emperor of Austria, who regarded it as one of his most important duties to watch over the safety of all the states united in the Germanic confederation.

So long as the agitation of the public mind was confined to that which naturally results from the nature of things, and which must inevitably have followed from the great and unexpected events that had taken place in the neighbouring states, his majesty had indulged the hope that the unsound state of public opinion would yield to the lessons of experience and the influence, which a calm and right-minded majority must exercise over a nation, which had ever been worthy the admiration of Europe by its noble character and profound sentiments, as well as by its respect for legal order, and the attachment it had shown to its princes in the most critical moments. But that the fermentation had now increased, in several countries of Germany, to such a degree, that it not only threatened the internal tranquility and safety of the different states, but even the existence of the entire confederation; which was exposed

to imminent peril by the close contact of the different countries of Germany; the immense quantity of revolutionary newspapers and other writings, with which it was inundated; the abuse of the liberty of speech even in the legislative chambers; the daily efforts of a foreign propaganda which at first concealed its machinations in darkness, but now did not hesitate openly to avow them; whilst the fruitless efforts made by the different local governments to repress these disorders, had produced the sad conviction that the spirit of revolution was marching with rapid strides in Germany, and only required to be longer tolerated by the confederation in order to break out into open revolt.

This state of things was no sooner clearly presented to the eyes of his majesty than he ceased to hesitate respecting the duty imposed on him by the position occupied by the imperial court in the confederation, and which had been sanctioned by the acts of the diet. The Emperor first addressed himself with full confidence to his majesty the King of Prussia, in order to examine attentively the state of Germany with this powerful and enlightened ally, and to deliberate in concert with his royal majesty, and with the other German governments, upon the measures imperiously required by the circumstances of the times.

In consequence of the free and reciprocal conferences which had been held between all the members of the confederation, and dictated by the desire of preserving those institutions which are consecrated by the law of nations, and by the sentiment of their duties towards the respective people confided to their care, Austria and Prussia had determined to unite in making the following communication to the diet.

“His majesty the Emperor of Austria and his majesty the King of Prussia have recognized it as their duty to represent to themselves a true picture of the dangers which threaten the internal tranquility of Germany, and to inquire what is the task and the obligation the Germanic confede-

ration and its several members are bound to perform, in order to avert the calamities by which we are threatened, and to secure in Germany the reign of legal order and tranquility. The two courts have become firmly convinced, as the result of this inquiry, that it is only by a firm and energetic use of those means, which the constitution of the Germanic confederation has provided, that the sovereigns of Germany can subdue this evil, which has now become but too manifest.

“The Germanic confederation was founded to secure the internal and external security of Germany.

“If experience has shown that the union has failed to accomplish one of its objects, viz: the internal security of Germany, inasmuch as the agitation of the public mind and the unsound state of public opinion have assumed an aspect so threatening, this failure must be attributed to one of two causes, either to existing defects in the legislation of the union, or in the actual application and execution of its laws.

“Until the establishment of the final act of 1820, the confederation was deficient in those organic laws which are essential to give efficacy to the development of its political design and objects. This act has supplied the defects of the federal act of 1815, so far as was possible without changing the nature and essence of the union itself. The final act embraces, for the preservation of the internal security of Germany, provisions which in their fundamental principles may be considered as amply sufficient for the exigencies of the present times. Whilst the final act of 1820 secures, by means of a suitable and tranquilizing interpretation, the faithful execution of the 13th article of the federal act; and provides an effectual remedy for the denial or unreasonable delay of justice by any member of the confederation, (article 29,) thus seeking to prevent abuses of authority on the part of rulers; it aims, on the other hand, to secure this authority against all democratic usurpations, by providing (art. 57) that the entire political

authority of the state must remain in the hands of its chief, and that the sovereign can only be bound by the local constitution to admit the co-operation of the legislative chambers in certain specified cases; and moreover (art. 27) when the internal tranquility of any confederated state is threatened by the resistance of the subjects to the sovereign authority, and there is reason to apprehend the spreading of the disturbances, or in case of actual insurrection, this act makes it the duty of the confederation to co-operate promptly for the restoration of order, and even to interfere without the application of the state in questions where circumstances prevent such application being made.

“Thus on the occasion of the disorders which broke out in the year 1830 in several German states, the diet by its decision of the 21st October, 1830, (34th session) decreed that military aid should be immediately furnished, in case of pressing danger, on the application of one state of the confederation to another, without previous notice to, or any deliberation or decree of the diet concerning the same. By this decision has the federal bond of the German states, established for the internal security of Germany according to the *fundamental principles of the union*, become closer and stronger than perhaps any other confederacy of states which has hitherto been known to exist. This fact renders, at the present moment, when it becomes necessary to stay the progress of these destructive evils, the introduction of any *new* fundamental principles or any *new* legal decisions of the diet quite as unnecessary, as would be any change in the constitution or legislation of the confederation.

“It is not therefore for want of an existing legislation, or on account of its imperfections, that according to the lamentable experience of recent times, on one side the brutal force of popular meetings, on the other hand the evil *genius of democracy* clothed in the garb of constitutional opposition, in connection with a *licentious press*, (both symptoms of the fundamental evil to be subdued,) seeks to weaken, and has already partially succeeded in weakening the power of

governments, has compelled them to make concessions, and seeks to extort from them rights which they cannot abandon, in the well understood interests of their subjects, without danger to the public order and established lawful authority.

“As to what concerns in particular.

“I. The relations of *legislative chambers*, the two courts are of opinion that however salutary may be the proper influence of legislative chambers in the German confederated states, nevertheless the direction which has recently been given to this institution is unquestionably a most deplorable phenomenon. This direction has manifested itself in two points of view, first as to the relations *between the legislative chambers and their own princes*, and secondly, as to their relations *with the confederation and the diet*.

“*In their relations with their own princes*, the legislative chambers required new concessions inconsistent with the monarchical principle, and with the maintenance of public order, and in case these concessions should be refused they held out in prospect a refusal of the budget.

“*In their relations with the confederation and the diet*, they not only showed a tendency to place themselves above the federal laws, but openly directed in their public deliberations attacks against the authority of the confederation and the diet.

“The federal legislation gives to the German governments the means of preventing such acts in future.

“It is hardly necessary to state that according to all the German constitutions the princes of Germany are entitled to the *initiative* in legislation, and that new laws cannot be proposed by the chambers except in the form of *petitions*, the sovereigns being left free to determine whether it be consistent with their own interests and those of their people, (which are intimately blended,) and with the duties which they owe to the confederation, to grant or refuse the petition. A conclusive reason for refusing the prayer contained in such a petition would be found in the fact of its conflict-

ing with the 57th article of the final act of 1820. Since this article expressly declares that the entire political authority of the state *must* remain in the hands of its chief, and that he is bound to admit the co-operation of the chambers in certain specified cases, *only*, it is certain that a sovereign member of the Germanic confederation is not only authorized to reject every petition inconsistent with this principle, but that he is *bound* in respect to the general interest of the confederation to reject them.

"No German prince, conscious of his own dignity and of his high vocation, will be impeded in the exercise of his right and the fulfilling of this duty, by a threat of refusing the budget; since the principle that the chambers can never refuse to a sovereign the necessary means of supporting a suitable organized government is implied in the true sense of the above cited article 57th of the final act of 1820, as well as expressly provided in the 58th article.

"Should therefore any legislative chamber be so far unmindful of its true position as to annex, either directly or indirectly, the condition of their propositions being granted to the vote of the taxes necessary to the support of a well regulated government, such cases must be reckoned among the number of those to which are to be applied the 25th and 26th articles of the final act of 1820.

"As to the relations between the internal legislation of any state and the federal legislation, the views of the two courts founded upon the existing decisions of the diet may be summed up in the following propositions :

"1. The internal legislation of the states forming the Germanic confederation cannot be in any manner opposed to the object of the confederation as declared by the federal act of 1815, art. 2, and by the final act of 1820, art. 1; nor to the organic regulations adapted to attain this object, (art. 13 of the final act, No. 2;) nor to the resolutions, which have already been adopted, or may hereafter be adopted for the development and completion of these ordinances. (Final act, art. 4.)

"2. Still less can such internal legislation prevent the performance of the duties, which each state owes to the confederation, and especially the payment of the federal contributions. (Final act, art. 52 and 58.)

"3. Nor have the legislative chambers of any state competent authority to expound and interpret the fundamental laws and other resolutions of the confederation, in cases where doubts arise respecting the true intent and meaning of these acts. This right belongs exclusively to the confederation itself, and is to be exercised by its organ the diet.

"4. In order that the rights of the confederation above enumerated may be effectually maintained against the attacks of the legislative chambers, not only by the local governments, but also directly by the confederation itself, a permanent committee shall be appointed by the diet for this purpose, which shall meet whenever the legislative chambers assemble in any state, and shall direct its attention to their proceedings, and whenever it observes any attempt to encroach upon the federal legislation, shall report the same to the diet, in order that such further measures may be taken by that body, according to circumstances and the situation of the confederation.

"These aggressions on the authority of the confederation and the diet will not be renewed, if the German states, according to their federal obligations, bind themselves mutually not to tolerate them, and to adopt the necessary measures, each, according to its own internal constitution, following in such case the analogy of the proceedings authorized in case of attacks upon the local sovereign or government, or of offences against either. An obligation already partially exists in this respect arising from the 59th article of the final act of 1820, which provides, that where the local constitution grants the right of public deliberation in the legislative chambers, the rules of the house must provide that this liberty shall not exceed its just bounds, either in the proceedings themselves, or in their publication



through the press, so as to endanger the tranquility of one of the confederated states, or of the entire confederation. And in case of such an aggression against the confederation, a committee of supervision may be appointed by the diet, similar to that proposed in No. 4. These propositions, joined to a demand for a conscientious, enlightened, and energetic fulfillment of federal duties, form the basis on which are grounded the views which the courts of Austria and Prussia recommend to the attention of their confederates for the purpose of resisting the manifestations in the legislative chambers which are above stated."

The propositions contained in this report were converted into a law of the confederation by an act of the diet dated the 28th June, 1832.

By the first article of this act it is declared, that "whereas, according to the 57th article of the final act of the congress of Vienna, 1820, the powers of the state ought to remain in the hands of its chief, and the sovereign ought not to be bound by the local constitution to require the co-operation of the chambers, except as to the exercise of certain specified rights, the sovereigns of Germany, as members of the confederation, have not only the right of rejecting the petitions of the chambers contrary to this principle, but the object of the confederation makes it their duty to reject such petitions.

"Art. 2. Since, according to the spirit of the said 57th article of the final act, and its inductions as expressed in the 58th article, the chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local constitution, the cases in which the chambers endeavour to make their consent to the taxes necessary for these purposes depend upon the assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the final act, relating to resistance of the subjects against the government.

“ Art 3. The interior legislation of the states belonging to the Germanic confederation cannot prejudice the object of the confederation, as expressed in the 2d article of the original act of confederation, and in the 1st article of the final act: nor can this legislation obstruct in any manner the accomplishment of the federal obligations of the state, and especially the payment of the taxes necessary to fulfil them.

“ Act. 4. In order to maintain the rights and dignity of the confederation, and of the assembly representing it, against usurpations of every kind, and at the same time to facilitate to the states which are members of the confederation the maintenance of the constitutional relations between the local governments and the legislative chambers, there shall be appointed by the diet, in the first instance for the term of six years, a commission charged with the supervision of the deliberations of the chambers, and with directing their attention to the propositions and resolutions which may be found in opposition to the federal obligations, or to the rights of sovereignty, guaranteed by the compacts of the confederation. This commission is to report to the diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years a new arrangement is to be made for the prolongation of the commission.

“ Art. 5. Since, according to the 59th article of the final act, in those states where the publication of the deliberations of the chambers is secured by the constitution, the free expression of opinion, either in the deliberations themselves, or in their publication through the medium of the press, cannot be so extended as to endanger the tranquility of the state itself, or of the confederation in general, all the governments belonging to it mutually bind themselves, as they are already bound by their federal relations, to adopt and maintain such measures as may be necessary to

prevent and punish every attack against the confederation in the local chambers.

“ Art. 6. Since the diet is already authorized by the 17th article of the final act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object ; in case doubts should arise in this respect, it is understood that the confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the confederation and the final act, which right it exercises by its constitutional organ, the diet.

Act of the  
Diet, 1834.

Further modifications of the federal constitution were introduced by the act of the diet of the 30th of October, 1834, in consequence of the diplomatic conferences held at Vienna in the same year by the representatives of the different states of Germany.

By the 1st article of this last mentioned act, it is provided, that “ in case of differences arising between the government of any state and the legislative chambers, either respecting the interpretation of the local constitution, or upon the limits of the co-operation allowed to the chambers in carrying into effect certain determinate rights of the sovereign, and especially in case of the refusal of the necessary supplies for the support of government conformably to the constitution and the federal obligations of the state, after every legal and constitutional means of conciliation have been exhausted, the differences shall be decided by a federal tribunal of arbitrators appointed in the following manner.

“ 2. The representatives, each holding one of the seventeen votes in the ordinary assembly of the diet, shall nominate, once in every three years, within the states represented by them, two persons distinguished by their reputation and length of service in the judicial and administrative service. The vacancies which may occur, during the said term of three years, in the tribunal of arbitrators

thus constituted, shall be, in like manner, supplied, as often as they may occur.

"3. Whenever the case mentioned in the first article arises, and it becomes necessary to resort to a decision by this tribunal, there shall be chosen from among the thirty-four, six judges arbitrators, of whom three are to be selected by the government, and three by the chambers. This number may be reduced to two, or increased to eight, by the consent of the parties; and in case of the neglect of either to name judges, they may be appointed by the diet.

"4. The arbitrators thus designated shall elect an additional arbiter as an umpire, and in case of an equal division of votes, the umpire shall be appointed by the diet.

"5. The documents respecting the matter in dispute shall be transmitted to the umpire, by whom they shall be referred to two of the judges arbitrators to report upon the same, the one to be selected from among those chosen by the government, the other from among those chosen by the chambers.

"6. The judges arbitrators, including the umpire, shall then meet at a place designated by the parties, or in case of disagreement, by the diet, and decide by a majority of voices the matter in controversy according to their conscientious conviction.

"7. In case they require further elucidations, before proceeding to a decision, they shall apply to the diet, by whom the same shall be furnished.

"8. Unless in case of unavoidable delay under the circumstances stated in the preceding article, the decision shall be pronounced within the space of four months at farthest from the nomination of the umpire, and be transmitted to the diet, in order to be communicated to the government of the state interested.

"9. The sentence of the judges arbitrators shall have the effect of an austrëgal judgment, and shall be carried into execution in the manner prescribed by the ordinances of the confederation.

"In the case of disputes more particularly relating to the financial budget, the effect of the arbitration extends to the period of time for which the same may have been voted.

"10. The costs and expenses of the arbitration are to be exclusively borne by the state interested, and in case of disputes respecting their payment, they shall be levied by a decree of the diet.

"11. The same tribunal shall decide upon the differences and disputes, which may arise in the free towns of the confederation, between the senate and the authorities established by the burghers in virtue of their local constitutions. This provision is not to be construed to make any alteration in the 46th article of the act of the congress of Vienna of 1815, relating to the constitution of the free town of Frankfort.

"12. The different members of the confederation may resort to the same tribunal of arbitration to determine the controversies arising between them; and whenever the consent of the states respectively interested is given for that purpose, the diet shall take the necessary measures to organize the tribunal according to the preceding articles.

The resolutions of the diet of the 28th June, 1832, excited the public attention throughout Europe, and became the subject of a motion in the British house of commons made by Mr. Henry Lytton Bulwer on the 2d of August of the same year. In his speech introducing the motion, the honourable member, after alluding to the historical circumstances connected with the overthrow of the ancient German empire, the establishment of the confederation of the Rhine, and the expulsion of the French armies from Germany by the efforts of the nation, stimulated by the promises of its rulers to revive and extend their ancient free institutions, observed that as the result of these efforts, and in confirmation of this engagement, the treaty of Paris, 1814, to which Great Britain was a party, declared (art. 6,) that "the states of Germany should be independent, and united in a federative bond." At the congress of Vienna, the plan

of confederation originally proposed by Prince Metternich declared, that the object of this confederation should be the maintenance of the internal and external security of Germany, and of the independence and inviolability of the confederated states "as well as that of the rights of each class of the nation." These last words were especially objected to on the part of the King of Wurtemberg, at that time engaged in a dispute with his subjects respecting their constitutional rights. It was on this occasion that the plenipotentiary of Hanover delivered a note to the congress, insisting that the ancient rights of the people of Germany should be maintained, and that even if Austria, Prussia, Bavaria and Wurtemberg should, on account of peculiar circumstances be excepted from this general guarantee, that still it should be proclaimed as law that in all those countries of Germany where no assemblies of states had previously existed, the consent of the states should be necessary to all taxes, and their concurrence to the enactment of all new laws, and that they should participate in the inspection of the manner in which the taxes thus voted, should be employed, and in case of any malversation, should be authorized to require the punishment of the public functionaries. To the contents of this note, Austria, Prussia, and Bavaria adhered.

Now here was evidence of the strongest and most important description. First, the original plan of confederation proposed by Prince Metternich, on the part of Austria, declaring that its object was, among other things, "to secure the rights of each class of the nation." Next, the declaration of the Hanoverian minister, to which Austria, Prussia, and Bavaria assented, which stated what those rights were; and called for assemblies of states, (and, what was of the utmost consequence,) defined their powers, the first and principal of which was the grant and appropriation of supplies.

At length the act of confederation was adopted. The second article declared that its object was "the mainte-

nance of the external and internal security of Germany, the independence and inviolability of the confederated states;" and though the additional words of the original plan "to secure the rights of each class of the nation," were dropped, yet the thirteenth article expressly declared that "each country of the confederation should be entitled to a local constitution of states." The note of Hanover had already defined the rights, powers, and duties of these legislative assemblies. The eighteenth article, which had now become of great importance, declared that "the princes and free cities of Germany had agreed to secure to the subjects of the confederated states the following rights." After enumerating these rights, with various measures that the diet should adopt for their security, it proceeded to declare that, "the diet will occupy itself at its first meeting with the enactment of uniform laws respecting the freedom of the press, and the measures necessary to secure authors and publishers against the pirating of their works." From the preamble of this article, which stated that "the princes and free cities of Germany had agreed to secure to the subjects of the confederated states the following rights," &c. it was clear that the uniform laws respecting the freedom of the press were intended to secure the right to the freedom of the press.

The sudden return of Napoleon from Elba left the labours of the congress imperfect and unfinished. He had little to say in favour of those labours, even of the act of confederation itself. They commenced by an assumption of authority on the part of five German powers to regulate the affairs of the whole of Germany. They destroyed, by the act of their own immediate authority, the power of many independent princes and free states; they erected a system with all the faults of the old empire, want of concentration and consolidation, without the advantages which the veneration due to antiquity inspires. Yet nobody could read that act of confederation, knowing the circumstances by which it was produced, and the proceedings

which attended its adoption, without being convinced that its avowed intention was to secure to all the people of Germany their ancient liberties ; to keep each country of the confederation independent of every other, as to its internal regulations ; to establish, in each, assemblies of states, with the power of imposing the taxes, and of regulating the appropriation of the public money ; and to confer, by a uniform law, the liberty of the press. Most of the sovereigns, soon afterwards, granted new constitutions to their people, or restored, with extended privileges, the ancient assemblies of states. But it was remarkable that Austria and Prussia, which had taken the lead in insisting upon adequate security for the constitutional liberties of the German nation, became as conspicuous for infringing them and evading the popular claims. This, of course, produced great dissatisfaction and excitement ; the unfortunate consequences of which were the assassination of Kotzebue and other similar excesses, which gave an unhappy pretext for the congress of Carlsbad in 1820. Did the sovereigns take that opportunity to satisfy their subjects by the fulfillment of their promises ? Did they then publish that law in favour of the liberty of the press, which was to have been promulgated immediately ? They did not attempt to put an end to discontent, but merely sought to suppress its language. They established a severe censorship on all periodical publications ; they assumed the power of suppressing all books, and they formed a central committee of police throughout the German empire. The second congress of Vienna immediately followed, which produced the final act of the confederation, a heterogeneous composition, the design of which was to annul by interpretation the spirit, whilst it kept within the letter of the act of 1815. Not one of its articles in favour of popular rights had ever been enforced, whilst all those against them had always been ostentatiously put forth, and were now marshalled forth anew in the protocol before the house. From this it was learned that the diet was offended with the journals



and pamphlets which inundated the country, and with the abuse of the liberty of speech in the legislative chambers. It invoked the eighteenth article of the federal act of 1815, which declared that uniform laws should be established to secure the liberty of the press, and at the same time stated that until all the governments should concur in establishing such laws, the decree of Carlsbad of the 20th September, 1819, abolishing the liberty of the press, should continue to be rigorously executed throughout the confederation. If after this, the diet should be enabled to maintain itself against the attacks of the press, or of the chambers, well and good. "But if not, Austria and Prussia would, at the invitation of one or all the confederated states, employ every means at their disposal for the maintenance and execution of the federal constitution, its important objects," &c. Was there ever a more complete profanation of terms! The objects of the Germanic union as set forth in the federal act were to preserve the inviolability and independence of the several states, not to make them the slaves of Austria and Prussia. The objects set forth in this fundamental law were to grant constitutions, not to take them away, or render the grant nugatory; to secure the liberty of the press, not to abolish it. In the protocol, the final act of 1820 was made responsible for all these new enactments of the diet. But the article, first cited for this purpose, was unfortunate. It declared that "the sovereign cannot be bound to admit the coöperation of the states, except in the exercise of rights especially determined." From this it followed that the sovereign was obliged to admit that coöperation where it was specially determined. But in many states, the coöperation of the states in granting and appropriating the taxes was specially determined; and in order to escape from the effect of this provision, it was stated that the internal constitution of the confederated states could not be so construed as to prejudice the objects of the confederation, and especially so as to defeat the supplies of money which each state was bound to contribute for the common

defence. The protocol also repeated the provision of the final act of 1820, that if any state, in case of internal troubles, was prevented from applying for the assistance of the confederation, the diet was bound, though not called on, to interfere. So that the diet, or rather Austria and Prussia, were left the sole judges of the necessity of such interference. And the protocol finally concluded with a sweeping clause, that the diet should be, in all cases of doubt, the ultimate judges of the extent of their own powers, which thus completed the annihilation of the chartered liberties of Germany.

In this state of things there were two considerations then to be submitted to the house. First, whether it approved of the proceedings of the Germanic diet? Secondly, whether it was good policy to interfere respecting them?

Although he had referred to the two federal acts of 1815 and 1820, (the last of which he considered a violation of the first,) partly because the British government was a party to the former, partly to show the inconsistency of Austria and Prussia on this subject, he meant by no means to rest the liberties of the German people on these two documents. They depended on the solemn promises that were made to them by their sovereigns as the reward of their exertions, and on the freedom they enjoyed under their ancient usages and constitutions. In regard to the promises they had received, the proof was to be found in the manifestoes of the sovereigns in the years 1812 and 1813, confirmed after the peace, and also in those opinions which they then industriously promulgated from the press and the pulpit.

The very gentleman by whom the protocol of the diet of June last is said to have been drawn up, (Mr. Gentz,) made one of the most stirring and eloquent appeals at that time to the spirit of liberty alive in every German breast. The King of Prussia called on the north of Germany "in the name and for the cause of independence, freedom, and knowledge." Who could have believed, that by independence, was meant the intermeddling interference of other

states ; by freedom the establishment of police committees ; by knowledge the suppression of teaching, and the severest censorship of the press ? As to the ancient liberties of Germany, it must be remembered that its various states always possessed the forms of free constitutions according to the opinion and practices of the age ; and that liberty of opinion, if it existed any where, existed for centuries in Germany, where it was now attempted to put it down. In the sixteenth century religion was the politics of that period. The conduct of states and individuals was judged, alliances were formed, wars were carried on, every thing in short depended on religious tenets, as much as on political opinions at the present day. The relations of one state to another, the power of a sovereign over his subjects, more especially since many of the lay rulers were ecclesiastics, depended entirely on the decline or progress of Protestant opinions. The doctrines published, as to one state, might, and must, materially affect the government and condition of others. Did the separate states on this account strip themselves of their independence ? Did they resign the practice of their own faith ? Did they abstain from preaching and publishing their own opinions ? Was such the purport of the treaties of Augsburg and Westphalia ? But taking the liberty of the press even in the modern acceptation of the term, it existed in Germany, by custom or privilege, prior to the French revolution. Nor did one state restrain it at the imperious demand of another. In Hanover, for example, the liberty of the press formerly made part of the privileges of the university of Gottingen, and the government had uniformly refused to prohibit its exercise in censuring the conduct of other German states. When he asked, then, whether the house approved of the conduct which had been pursued by the diet, he laid before it no common case. The holy alliance had not now occupied itself with a subject like that which was before it at the congresses of Laybach and Verona. Here was not a case, in which a people had hastily, perchance prematurely,

claimed a liberty which they never before enjoyed ; here was not a case, in which no promises had been made, and no right therefore existed for expectation or disappointment ; here was not a case, in which the sovereigns had done every thing and their subjects nothing. Nor was this the case of a people who followed the example of their sovereign in submitting to a foreign yoke. It was not in Italy, in Portugal, in Spain that liberty was now to be crushed. It was in Germany, the father-land of freedom ; in Germany, to which the most magnificent promises were made ; in Germany, to the people of which its princes owed their thrones, Europe its peace, and England its dear bought glory.

But, such being supposed to be the sentiments of the house respecting the proceedings of the Germanic diet, was it good policy to interfere ? England was placed by circumstances in such a situation that if she did not interfere, by some expression of her opinion at least, in favour of the German people, she must be supposed to have taken the part of the German sovereigns. It was well known that one of the misfortunes, which accompanied the otherwise happy event of the accession of the present reigning family to the British throne, was that by which George I. remained elector, as the present sovereign then was king of Hanover. It might be theoretically true that Hanover and England were two separate kingdoms ; but it never had been, and could not be so practically. The policy pursued by the king of Hanover must, without strong proofs to the contrary, be considered as the probable policy of the king of England. Now this being the case, the house could not be ignorant that the king of Hanover had signed and approved the document which was the subject under consideration. The house could not, therefore, be considered indifferent to, or entitled to stand aloof from this question. All the moral influences resulting from the supposition that the personage at the head of the British government was favourable to the oppression of the diet, was then in full

operation against the resistance of the people. A desire to interfere with the domestic transactions of foreign states was far from his ideas of the course of policy that England ought to pursue. Still he would not consent to her being considered a mere cypher in the political combinations of Europe. He would not consent to the proposition that she was to look with perfect indifference on the continent, and think that no changes there could by possibility affect her. If there was any thing which immediately affected the interests of England more than another, it was the fate of Germany. Unite that country under a good government, and it would be at once a check upon the aggrandizement of France, and the ambition of Russia. Leave it as it was, and it would be a prey to the one, or a tool in the hands of the other. It was the strength of Germany which ensured the peace of Europe ; and if England wished Germany to be strong, was it not wise in the house to address the sovereign according to the terms of his motion ? Would it not be wise in the sovereign to listen to the counsel of the house, when it addressed him to exercise his influence with the diet and princes of Germany, in disposing them not to forfeit those pledges England joined them in giving ; not to rely upon the brute force of their armies against that moral force which was stronger than armies in these days of public opinion ; not to separate themselves from their people through any confidence in their present power ; from the people who clung to them, and supported, and re-established their thrones in the day of their past distress ; not to lay their country again open to the overwhelming forces which any new revolution in France might pour into it. Surely there was no one who could dissent from the principles, from the policy, and from the prudence of such an address. War in Europe could only be averted by not allowing those hostile principles which now stood in battle array against each other to come into actual collision. He advised such an interference as he had proposed as the means to avert war ; but if the battle for free opinions

must be waged, most grateful and rejoicing would he be that the battle should be fought on that soil where it was heretofore so gloriously decided ; most grateful and rejoicing would he be, that it was to be fought by the descendants of the men, who with conscience for their support, defeated Charles V. with Spain and the Indies at his back ; that it was to be fought on the land of Luther, and by the sons of those to whom freedom of thought had ever been the rallying word of victory. With that land, and the people of that land, the people of England must ever be connected. It was in the free forests of Germany that the infant genius of her liberty was nursed. It was from the altars of Germany that the light of her purer religion arose. It was from one of the minor states of Germany that her constitutional monarchs came. He appealed not only to all these recollections and sympathies, but also to all those considerations which self interest, policy, and prudence could suggest in support of the motion he was then about to read to the house. He moved " that an address be presented to his majesty, requesting him to exercise his influence with the Germanic diet in opposition to the course, pursued by them, contrary to the liberties and independence of the German people."

Lord Palmerston, in opposing the motion, stated that it was not necessary for the honourable member to make any apology to the house for bringing under its consideration a subject, which had excited so deep and universal an interest in every country of Europe. If the honourable gentleman thought that events were pending which threatened the independence of the German states, it was to him (Lord Palmerston) no matter of surprise, that, as a member of the British house of commons, he should take an opportunity of drawing the attention of parliament to the subject ; for he was not prepared to admit that the independence of constitutional states, whether they were powerful, like France or the United States of America, or of less relative political importance such as the minor states of Germany, ever

could be a matter of indifference to the British parliament, or, he should hope, to the British public. Constitutional states he considered to be the natural allies of this country; and whoever might be in office conducting the affairs of Great Britain, he was persuaded that no English ministry would perform its duty if it were inattentive to the interests of such states. But it was one thing to admit the importance of the question, and the deep interest the country ought to take in it, and another to argue that the government should adopt any particular course of proceeding which an honourable member might advise; and the noble lord was not prepared to accede to the proposal with which the honourable gentleman had concluded his address, because he did not think that the state of affairs in Europe, and the complexion assumed by the transactions to which the motion referred, were such as to call, at present, for those steps which the honourable gentleman recommended. He entirely agreed in the honourable gentleman's view of the objects for which the Germanic confederation was formed by the treaty of Vienna. The principal object for which that confederation was formed, was not only the internal and external safety of the states which composed it, but also the maintenance inviolate of their separate and individual independence. It, therefore, could not be denied, that any thing which threatened to destroy or violate that independence, would be inconsistent with the principles on which the confederation was established; and would, so far, be a departure from the treaty of Vienna, to which all the great powers of Europe were contracting parties. But what was the state of these transactions as far as they had gone? He was not standing there to express his approbation to those resolutions of the diet, upon which the honourable gentleman had founded his motion: perhaps a British minister was not called on to pronounce a judgment, one way or the other, on the acts of independent governments, who must be considered, *prima facie*, the most competent judges of what suited their wants and existing situation.

Whether these resolutions, therefore, did, or did not, outstep the necessity of the case, he was, perhaps, as one of the ministry, not called on to say; but, in his own private opinion, he could not help entertaining an apprehension, that the governments who had entered in these resolutions, had over-estimated the dangers against which they were endeavouring to guard, and had not framed with the greatest possible degree of discretion that measure which they proposed to apply as a remedy for the danger. But though he could go thus far with the honourable gentleman, prudence and discretion required that they should rather look dispassionately at what had occurred, than come to a hasty conclusion as to what might yet take place. Uncertain facts and doubtful surmises ought not to be the basis of any important proceedings. But all that they knew at present was, that a certain number of independent sovereigns, united in a confederation, which is sanctioned by all the great powers of Europe, had unanimously adopted certain resolutions applicable only to their own states, and not involving any point whatever which concerned their foreign relations with other independent sovereigns. It, therefore, appeared to him that other states could not find any just ground for interference with these governments on the resolutions which they themselves had voluntarily adopted. In respect to British relations with foreign states, they could only consider the acts of the governments of those states; because looking externally at the states themselves, it was by the acts of their governments alone that foreign governments were able to judge of their intentions. The honourable gentleman seemed to apprehend that these resolutions, if carried into effect to their fullest extent, might, in the first place, create differences between the sovereigns and their subjects, and subsequently give rise to serious misunderstandings among the members of the confederation themselves. But, in looking at these resolutions, they must not shut their eyes entirely to the facts which had gradually led to the adoption of those resolutions; and it was



unquestionable that there were many appearances in Germany of a disposition to disturb the internal tranquility of the confederation on grounds which would not justify that disturbance. He alluded to several public meetings, and more particularly to the meeting which took place at Hambach, with all the symptoms of excitement which were there exhibited. He would not deny that if the resolutions of the diet were acted on to their fullest extent, steps might be taken which would so trench on individual rights, and which would cause such serious differences among the Germanic body as might render it impossible to hope that the peace of Europe could be preserved ; and if the peace should be broken on such grounds as these, it would perhaps give rise to a war, not merely between the states of Germany, but a war of opinion which would spread its influence beyond the country where it had its source ; in which case Great Britain would not only be entitled, but called on to take such steps, as circumstances might require, to preserve Europe against the consequences of such an injurious and extensive principle of warfare. But when the honourable gentleman called on the house to address his majesty to use his influence with the Germanic confederation, it might in the first place be asked in what capacity he wished the sovereign to interfere ; whether he wished him to interfere as king of Hanover or as king of England ? Because, if it was as king of Hanover, he should think that the honourable gentleman would, on reflection, see that the British house of commons had no claim to make such a request. But if the honourable gentleman proposed this address to the king, as sovereign of Great Britain, and as party to the treaty of Vienna, which established and secured the independence of these states of Germany, he should then say that the ground on which he resisted the motion was the ground of discretion. Not that he denied that the king of England had a right to express his opinion on this matter, (for he agreed with the honourable gentleman that such a right must undoubtedly have existed,) but

because he thought that nothing had yet occurred which called for such an interposition on the part of his majesty, or on the part of that house, for such a premonition as was implied in the motion. At the same time he could assure the honourable gentleman that the government was not inattentive to those important events to which he had so ably drawn the attention of the house. He could also assure him, that even without such an address as he had proposed, the advisers of his majesty would deem it their duty to keep their attention fixed on those circumstances which were then taking place on the continent of Europe, never, he trusted, undervaluing their deep importance with reference to England; because let persons recommend as they would the propriety of England withdrawing herself from all political connection with the rest of the world, his opinion was, that so long as her commerce was of importance to her, so long as continental armies were in existence, so long as it was possible that a power in one quarter might become dangerous to a power in another; so long must that country look with interest to the transactions on the continent, and so long was it proper for her, in the maintenance of her own independence, not to shut her eyes to any thing that threatened the independence of Germany. But he could not bring himself to believe that the alarm of the honourable gentleman was really well-founded; he could not believe that any one administering the affairs of a great country could take so erroneous a view of its own interests, or of the interests of society, as to wish to deprive independent states of those constitutional rights, which were such a blessing to themselves, and certainly were no injury to their neighbours. He could not believe that such a wish existed, where there was power to carry that wish into effect; or even if such a wish did exist, he could not believe that those who had the desire deemed it possible for them, in the present state of the world, to carry that wish into execution. He could not believe that they could think it practicable by mere military force, to deprive millions of men

of those constitutional privileges which had been formally conceded to them; because that would be to impute to them a want of knowledge and judgment, under which it was impossible to suppose persons to labour, whose extensive experience must have led them to a far different conclusion. He was, therefore, convinced that the intention of these resolutions, (however calculated they might be to excite alarm,) was merely to guard against those local dangers, the existence of which it was impossible to deny, though he thought their magnitude and importance had been greatly exaggerated. Under these circumstances he could not but believe that these governments, on whose decision might depend not only the fate of Germany, but the peace of Europe, would, so soon as the contemplated purpose of guarding against those local dangers was accomplished, have sufficient wisdom to abstain from pursuing the matter to further extremities, and would foresee those perils which their moderation and forbearance might prevent. He could not but believe that while, on the one hand, the violent party, which was but small, would abstain from exciting further alarm, so, on the other hand, the governments would see that there could be no advantage in trenching on the rights of the constitutional states, but that their own interests, as well as the interests of all Europe, would be most promoted by the preservation of peace. Under these circumstances, he felt it to be his duty to give a negative to the motion.

The motion was accordingly negatived by the house.<sup>1</sup>

§ 14. Affairs  
of Italy.

By a secret article of the treaty of Toeplitz of the 9th September, 1813, between the four allied powers, Austria, Great Britain, Prussia, and Russia, the reconstruction of Austria, upon a scale proportioned to that of 1805, had been stipulated. In order to accomplish this engagement,

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<sup>1</sup> Hansard's Parliamentary Debates, Third Series, vol. xiv. pp. 1020-1049.

the congress of Vienna restored to Austria all the possessions, she had ceded to France and her allies by the treaties of Campo Formio in 1797, of Luneville in 1801, of Presburg, in 1805, of Fontainebleau in 1807, and of Vienna in 1809, except Belgium and the former Austrian territories in Swabia. To these retrocessions, were added Venice, and all the other parts of the ancient Venetian states of the Terra Firma, so as to include the whole of the territory between the Tessino, the Po, and the Adriatic, which has been since constituted into the Lombardo Venetian kingdom, together with the valleys of the Vatteline, the Bormio, and Chiavenna.

The duchy of Modena was restored to the Archduke Francis of Este, and that of Massa and Carrara to the Archduchess Maria Beatrix of Este, and their descendants, subject to the rights of succession and reversion of the house of Austria.

The duchies of Parma, Placentia and Guastalla were ceded to the Archduchess Maria Louisa, subject to the same rights in favour of the house of Austria and Sardinia.

The grand duchy of Tuscany was restored to Archduke Ferdinand of Austria, with the addition of certain other territory.

The duchy of Lucca was vested in the Infanta Maria Louisa and her descendants, subject to the right of reversion in the grand duchy of Tuscany.

Ferdinand IV. was re-established upon the throne of Naples, and recognized by the powers as King of the kingdom of the Two Sicilies.

The King of Sardinia was restored to his former possessions in Piedmont and Savoy, with some changes of frontier towards France and Switzerland. To these were added the states belonging to the former republic of Genoa.

This ancient republic had been subverted, in consequence of the French invasion and conquest of Italy, and was annexed to the French empire in 1805. In 1814 the city of

Union of  
Genoa to Sar-  
dinia.

Genoa was surrendered to the British troops under the command of Lord W. Bentinck, who issued a proclamation, on the 26th April, "stating that considering that the general desire of the Genoese nation seems to be to return to that ancient form of government under which it enjoyed liberty, prosperity and independence; and considering likewise that this desire seems to be conformable to the principles recognized by the high allied powers, of restoring to all their ancient rights and privileges;" and declaring "that the Genoese state, as it existed in 1797, with such modifications as the general wish, the public good, and the spirit of the original constitution seem to require, is re-established." Lord W. Bentinck seems to have been uninformed of the real views and intentions of his government, since in a paper communicated by Mr. Pitt to the Russian ambassador in London on the 19th January, 1805, that minister had proposed that the allies should, in case of success in the approaching campaign against France, cede the states of Genoa to the King of Sardinia, in order to form a stronger barrier against France on the side of Italy. This intention was confirmed by the second secret article of the treaty of Paris of the 30th May, 1814; and was now carried into effect by the congress, in spite of the remonstrances of the provisional government of Genoa, appealing to the guarantee of its independence contained in the treaty of Aix la Chapelle, 1745.<sup>r</sup>

In the debate in the British house of commons on the resolutions proposed, on the 27th April, 1815, by Sir James Mackintosh respecting this transaction, he contended, that independent of the question of the supposed pledge to the Genoese nation contained in the proclamation of Lord W. Bentinck, Great Britain could not morally treat the Genoese territory as a mere conquest which she might hold as a province, or cede to another power at her pleasure. In

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<sup>r</sup> Klüber, *Acten des Wiener Congresses*, vii. Band, §§ 420-433.

the year 1797, when Genoa was conquered by France (then at war with England,) under pretence of being revolutionized, the Genoese republic was at peace with Great Britain, and consequently in the language of the law of nations they were friendly states. Neither the substantial conquest in 1797, nor the formal union in 1805, had ever been recognized by that kingdom. When the British commander, therefore, entered the Genoese territory in 1814, he entered the territory of a friend in the possession of an enemy. Supposing him, by his own unaided force, to have conquered it from the enemy, could it be inferred that he conquered it from the Genoese people? He had rights of conquest against the French. But what right of conquest could accrue from their expulsion against the Genoese? How could Great Britain be at war with the Genoese? Not with the ancient republic of Genoa, which fell, when in a state of amity with her:—not as subjects of France, because she had never legally and formally acknowledged their subjection to that power. There could be no right of conquest against them because there was neither the state of war, nor the right of war. Perhaps the continental powers, who had either expressly or tacitly recognized the annexation of Genoa in their treaties with France, might consistently treat the Genoese people as mere French subjects, and, of consequence, the Genoese territory as a French province conquered from the French government, which to them had become the sovereign of Genoa. But England stood in no such position. To her the republic of Genoa still of right subsisted. She had done no act which implied the legal destruction of that commonwealth, with whom she had no war, nor cause of war. Genoa ought to have been regarded by England as a friendly state, oppressed for a time by the common enemy, and entitled to reassume the exercise of her sovereign rights, as soon as that enemy was driven from her territory by a friendly force. Voluntary, much more cheerful union, zealous coöperation, even long submission, might have altered the state of belli-

gerent rights. None of these were here pretended. In such a case, he contended that, according to the principles of the law of nations, anterior to all promise, and independent of all pledged faith, the republic of Genoa was restored to the exercise of her sovereignty, which in British eyes she had never lost, by the expulsion of the French from her soil. These were no reasonings of his : he read them in the most accredited works on public law, delivered long before any events of our time were in contemplation, and yet applicable to this transaction as if they had been contrived for it. Vattel, in the 13th and 14th chapters of his third book, had stated fully and clearly the principles respecting the application of the *jus postliminii* to the case of states, which he had taken from his eminent predecessors.

"When a nation, a people, a state, has been entirely subjugated, it may be asked whether a subsequent revolution entitles it to enjoy the right of postliminy ? We must here distinguish the cases in order to answer this question satisfactorily. If the state has not yet acquiesced in this new dominion, if it has not voluntarily surrendered, and if it has merely ceased to resist for want of power ; if its conqueror has not laid down the conqueror's sword in order to assume the sceptre of an equitable and pacific sovereign, this people has not in truth submitted ; it is only vanquished and oppressed ; and when it is delivered by the arms of an ally, it returns, without doubt, to its former condition. Its ally cannot become its conqueror ; he is a liberator who is merely entitled to be rewarded for the service he has rendered. If the last conqueror, not being the ally of the state of which we speak, pretends to retain it under his dominion as the price of his victory, he puts himself in the place of the first conqueror, and becomes the enemy of the oppressed state, which may lawfully resist him, and profit of a favourable occasion to recover its liberty. If it has been unjustly oppressed, he who delivers it from the

yoke is bound to restore it, generously, to all its former rights.\*

Whoever carefully considered this passage would observe that it was intended to be applicable to two very distinct cases :—that of deliverance by an ally, where the duty of restoration is strict and precise ; and that of deliverance by a state unallied, but not hostile, where, in the opinion of the writer, the reëstablishment of the oppressed nation, is at least the moral duty of the conqueror, though arising only from our common humanity, and from the amicable relation which subsists between all men, and all communities till dissolved by wrongful aggression. It seemed very difficult, and had not hitherto been attempted, to reconcile this passage with the annexation of Genoa. It was not his disposition to overrate the authority of this class of writers, or to consider authority in any case as a substitute for reason. But these eminent writers were at least necessarily impartial. Their weight, as bearing testimony to general sentiment and civilized usage, received a new accession from every statesman who appealed to their writings, and from every year in which no contrary practice was established, or hostile principles avowed. Their works were thus attested, by successive generations, to be records of the customs of the best times, and depositaries of the deliberate and permanent judgments of the more enlightened part of mankind. Add to this, that their authority was usually invoked by the feeble, and despised only by those who are strong enough to need no aid from moral sentiment, and to bid defiance to justice. He had never heard their principles questioned but by those whose flagitious policy they had by anticipation condemned.†

The Swedish revolution of 1809, and the abdication of Gustavus IV, were followed by the peace of Fredericksham,

§ 15. Union  
of Norway  
and Sweden.

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\* Vattel, *Droit des Gens*, liv. 3, ch. 14, § 213.

† *Hansard's Parliamentary Debates*, vol. xxx. pp. 894-935.



by which the province of Finland and the islands of Aland were ceded to Russia. By the treaty of Petersburg of 1812, between Russia and Sweden, the former promised to secure the possession of the Danish kingdom of Norway to the latter as an indemnity for the loss of Finland and as the price of an alliance against France. Denmark was at last compelled to desert the alliance of France, and make a separate peace with Sweden at Kiel, on the 14th January, 1814, by which Norway was ceded to that power, and Denmark was partially indemnified with Swedish Pomerania and the island of Rugen. These latter possessions were subsequently exchanged with Prussia for the duchy of Lauenburg.

The two Scandinavian kingdoms were thus united under one sceptre, and Russia completed, at the expense of Sweden, her arrondissement on the shores of the Baltic which had been commenced by the treaty of Nystadt, 1721.

§ 16. Union  
of Belgium  
with Holland.

The union of Belgium, and the grand duchy of Luxemburg, with the former united provinces of Holland, under the monarchy of the King of the Netherlands, completed that new system which the congress of Vienna had designed for the security of Europe against the military ambition of France.

This arrangement, which may be said to form the corner stone of its edifice, was overthrown by the French and Belgic revolutions of 1830, by which the triumph of the armed interference of the allies, in the restoration of the elder branch of the house of Bourbon, was reversed, and Belgium was raised to the rank of an independent state. The terms and conditions of the separation between Belgium and Holland as settled by the treaty of November 15th, 1831, between the former and the five powers, having been at last accepted by the latter, have become a part of the public law of Europe.

§ 17. Swiss  
confederation.

Switzerland had felt in common with every continental nation bordering upon France the effects of the French revolution of 1789. The original number of cantons was

augmented to nineteen, in consequence of the separation of various districts dependent on the ancient cantons, as subjects or allies, such as Vaud, Saint Gallen, Argovie, the Grisons, and Thurgovie. The internal dissensions among the cantons were composed by the act of mediation of 1803, under the auspices of Bonaparte, as first consul of the French republic. They broke out anew, on the downfall of the French empire, and the invasion of Switzerland by the allied powers in 1813. A new federal pact was formed, under their mediation, to which all the cantons finally acceded in 1815. Their number had been, in the mean time, augmented to twenty-two by the addition of the Valais, Geneva, and Neufchâtel. The various conflicting claims of the different cantons were adjusted by the arbitration of the congress of Vienna, and the integrity, independence, and neutrality of the Swiss confederation were recognized in the final act referring to the preceding declarations of the allied powers.<sup>u</sup>

The confederation, as thus remodelled, consists of a union between the twenty-two cantons of Switzerland, the object of which is declared to be the preservation of their freedom, independence, and security against foreign attack, and of domestic order and tranquility. The several cantons guaranty to each other their respective constitutions and territorial possessions. The confederation has a common army and treasury, supported by levies of men and contributions of money in certain fixed proportions among the different cantons. In addition to these contributions, the military expenses are defrayed by duties on the importation of foreign merchandize, collected by the frontier cantons, according to the tariff established by the diet, and paid into the common treasury. The diet consists of one deputy from every canton, each having a single vote, and

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<sup>u</sup> Martens, *Nouveau Recueil*, tom. vii. p. 173. Klüber, *Actes des Wiener Congresses*, 7 B'd, § 310.

assembles every year, alternately at Berne, Zurich, and Lucerne, which are called the directing cantons, (*Vorort*.) The diet has the exclusive power of declaring war, and concluding treaties of peace, alliance, and commerce with foreign states. A majority of three-fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each canton may conclude separate military capitulations, and treaties relating to economical matters and objects of police, with foreign powers; provided they do not contravene the federal pact, nor the constitutional rights of the other cantons. The diet provides for the internal and external security of the confederation; directs the operations and appoints the commanders of the federal army; and names the ministers deputed to other foreign states. In addition to the powers exercised by the directing canton, or *Vorort*, previous to the year 1798, the diet may delegate to it special full powers, under extraordinary circumstances, to be exercised when the diet is not in session; adding, when it thinks fit, federal representatives to assist the *Vorort* in the direction of the affairs of the confederation. In case of internal or external danger, each canton has a right to require the aid of the other cantons; in which case, notice is immediately to be given to the *Vorort*, in order that the diet may be assembled to provide the necessary means of security.\*

The above compact is plainly nothing more than a mere league, or system of confederated states; not differing essentially from a treaty of perpetual alliance between independent communities, in which each member of the union retains its own sovereignty unimpaired. After the French revolution of 1830, various changes had taken place in the internal constitutions of the different cantons, tending to give them a more democratic character. A plan for a revision of the federal pact of 1815, which in various parti-

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\* Martens, *Nouveau Recueil*, tom. viii. p. 173.

culars tended to give the central authority more of the character of a supreme federal government, or composite state, was drawn up by a committee of the ordinary diet assembled at Lucerne in 1832. This plan encountered very decided opposition on the part of the cantons of Neuchâtel, Uri, Unterwalden, Schwitz, Bâle, Valais, and Tessin ; which had formed a sort of separate confederation, called the league of Sarnen, insisting upon the conditions of the pact of 1815, and the exclusion of the two newly formed cantons of *Bâle-campagne*, and what are called the *Exterior districts* of Schwitz, which had declared themselves independent of the cantons from which they had separated. This plan of revision was submitted to the deliberations of an extraordinary diet, assembled at Zurich in 1833, in which sixteen of the principal cantons were represented, and which again modified essentially the proposed plan upon entire federal principles. It retained, however, the most important feature of reform proposed by the diet at Lucerne, by which the central executive power was to be vested in four councillors, with a president under the title of *Landamman*, elected for the term of four years. This council was to be divided into four departments of the interior, foreign affairs, finances, and war ; each councillor being charged with the duties of a department. The plan, thus modified, was submitted to the legislative councils of the several cantons, by some of which it was rejected ; by others, accepted, either conditionally, or subject to an appeal to the 'people in their primary assemblies : while the dissentient cantons, adhering to the league of Sarnen, continued to protest against any alteration in the original pact of 1815. The ordinary diet, convened at Zurich in July, 1833, adopted measures for recognizing the separation of *Bâle campagne* from the ancient cantons ; and for dissolving the league of Sarnen, and compelling the dissentient cantons to send deputies to the national diet. At a subsequent session of the diet at the same place in 1834, in which all the cantons were represented, the question of

the revision of the federal pact was again taken up, and considered as to the manner in which it should be effected. Three different modes were proposed for this purpose;—that of a constituent assembly representing the whole Swiss nation; a free conference among the different cantons; or by the diet itself under special instructions from the constituents represented in that body. Neither of these propositions obtained a majority of votes, so that Switzerland still remains subject to the federal pact established in 1815 under the mediation of the allied powers.\*

§ 18. Definition of the relative rank of public Ministers.

Besides the above territorial and federal arrangements, several general principles, more or less important, were established by the decisions of the congress of Vienna, and incorporated into the international code of Europe.

I. The modern usage of the European states constituting the positive law of nations had introduced several distinctions in respect to the different classes of public ministers, which for want of exact definition became the perpetual source of controversies. A uniform rule was adopted by the congress, by which public ministers are divided into the three following classes :

1. Ambassadors, and papal legates, or nuncios;
2. Envoys, ministers or others accredited to sovereigns.
3. Chargés d'affaires accredited to the minister of foreign affairs.†

The congress of Aix la Chappelle amended this regulation by declaring, that ministers resident, accredited to sovereigns, should form an intermediate class between ministers of the second order and chargés d'affaires.‡

\* Wheaton, *Elements of International Law*, p. 69, edit. Philadelphia, 1836.

† Klüber, *Acten des Wiener Congresses*, 6 Band, § 204.

‡ Protocol du Congrès d' Aix la Chapelle du 21 Novembre, 1818, *Martens, Manuel Diplomatique*, ch. 4, § 38.

II. By the first additional article of the treaty of peace, signed at Paris on the 30th. May, 1814, between France and Great Britain, the two powers agreed to unite their efforts at the approaching congress for the abolition, by all the powers of Christendom, of the African slave trade, as being contrary to the principles of natural justice and an enlightened age. The subject was accordingly taken up in the conferences of the eight powers, parties to the treaty of peace at Paris, by whom a declaration was signed on the 8th February, 1815, announcing that they had taken into consideration the commerce known under the name of the African slave trade, which had been at all times regarded by just and enlightened men as repugnant to the principles of humanity and universal morality.

§ 19. Abolition of the African Slave Trade.

That the peculiar circumstances in which this trade had originated, and the difficulty of suddenly putting an end to it, might in a certain degree have concealed the odium of continuing it; but that at last the public voice had been raised in all civilized countries to demand its suppression as soon as possible; that since the character and particular details of this trade had become better known several European governments had determined on its abolition, and that successively all the different powers, possessing colonies in the different parts of the globe, had recognized the necessity and duty of this measure:

That the plenipotentiaries assembled in the congress could not more honourably fulfil the duties of their mission, and manifest the principles which guided their august sovereigns, than by endeavouring to give effect to this engagement, and proclaiming, in their name, the desire of putting an end to a scourge, which had so long desolated Africa, degraded Europe, and afflicted humanity:

That for this purpose, they had agreed to declare in the face of Europe, that considering the universal abolition of the slave trade as a measure particularly worthy of their attention, conformably to the spirit of the age and the generous principles of their august sovereigns, they were ani-

mated with the sincere desire of concurring in the most prompt and efficacious execution of this measure, by all the means in their power, and to act in the employment of these means with all the zeal and all the perseverance due to a cause so great and so admirable :

That this general declaration could not prejudice the limitation of time within which each power in particular should judge most proper for the final abolition of the slave trade ; and that consequently the determination of the period when this commerce should totally cease should become an object of negotiation between the powers, it being well understood that no proper means would be neglected of securing and accelerating its progress ; and that the reciprocal engagement contracted by the present declaration between the parties should only be considered as fulfilled when complete success should have crowned their united efforts.\*

§ 20. Freedom of Navigation of the great rivers.

III. The treaty of peace at Paris of 1815, had stipulated that the navigation of the Rhine and the Scheldt, (the former of which had been impeded by various regulations of the riparian states and the latter had been shut up by the treaty of Westphalia,) should be henceforth free, and that the future congress should consider of the means of extending this freedom of navigation to all the other European rivers separating or running through different states.

The congress of Vienna accordingly appointed a committee of navigation, to which was referred a memoir, presented by Baron Wilhelm Von Humboldt, plenipotentiary of Prussia, on the 3d of February, 1815. In this memoir, which formed the basis of the labours of the committee, it was stated, that in order to adopt general regulations on this important subject, it would be necessary to consider :

1. The principles which the general interest of commerce rendered it expedient to adopt, and which might

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\* Klüber, Acten des Wiener Congresses, tom. iv. p. 531.

be established without going into those details, which could not be followed without discriminating between different localities.

2. To apply these principles to the Rhine and the Scheldt, adding those particular rules which a knowledge of the localities should suggest, and which the relations between the different riparian states might render necessary in order to fulfil the stipulations of the treaty of peace.

3. To determine in what manner the same principles might be applied, so far as circumstances would permit in so vast a subject, to all other navigable rivers in every part of Europe.

In order to conciliate the interests of commerce with those of the riparian states, it would be necessary, on the one hand, that every regulation indispensable to the freedom of navigation, from the point where a river becomes navigable to its mouth, should be adopted by common consent in a convention, subject to be altered only by the unanimous consent of the parties ; and, on the other hand, that no riparian state should be disturbed in the exercise of its rights of sovereignty, in respect to commerce and navigation, beyond the stipulations of this convention, and at the same time should be entitled to its share of the nett revenues collected upon the navigation in proportion to the extent of its territory along the banks of the river. It would be necessary to establish, upon those bases, principles so general that the difference of localities should only require modifications in their detailed application.

The points to be regulated by these principles were the following :

1. The freedom of navigation.
2. The duties of staple (*d'étape*) where they already exist, since nobody would think of establishing new duties of this nature.
3. The general tariff of duties to be levied upon the navigation. It was deemed indispensably necessary to



regulate these duties in their totality from the point where the river becomes navigable to its mouth, in a fixed, uniform, and invariable manner, subject to a periodical revision, (if it should be thought necessary,) of the tariff, by all the riparian states, after the lapse of a certain number of years. It was also deemed necessary that the rate of duties should be sufficiently independent of the particular quality of the goods, to avoid the inconvenience of detaining the vessel on its passage in order to make a detailed examination of its cargo.

4. As nothing is so injurious to navigation as to be compelled frequently to touch at intermediate points for the purpose of paying duties, the attention of the committee would, above all, be directed to the object of diminishing the number of bureaux.

5. An absolute separation of the collection of the duties of customs from those imposed on the navigation of the river, and the necessary precautions to prevent the right of the riparian states to establish custom houses from interfering with the free navigation.

6. The appropriation of the receipts of the duties to the necessary works, and the distribution of the residue among the riparian states in proportion to the extent of their territory along the banks of the river.

The separation of the works, necessary to navigation, from those which have for their object the preservation of the country from inundation, with the necessary precautions to be taken in order that these double works should be undertaken on the same system, so as not to interfere with each other.

7. The regulations of police for the navigation to be uniform, and established by common consent, so as not to be changed by one of the riparian states alone ; but so as not to interfere with the police which these states may exercise upon the rivers, without interfering with the freedom of navigation.

8. Mutual engagements to provide, as far as possible,

for the security of navigation, even in case of war between the riparian states.

The application of these general principles to the navigation of the Rhine would be facilitated by a reference to the convention relating to the *octroi* of the navigation of the Rhine concluded in 1804, subject to such alterations as supervening circumstances might render necessary. It would be found impossible to conclude similar conventions applicable to the other great European rivers during the sitting of the congress. But a considerable advance might be made towards the general freedom of river navigation, by inviting the powers who should sign the final act of the congress to pledge themselves to conclude with each other, and with other powers, arrangements respecting the freedom of navigation of those rivers within their territories which are common to other states, in the same manner as it is the usage to stipulate in treaties of peace for the conclusion of treaties of commerce. In order to obviate the vagueness of this pledge, which might render it illusory, the powers should also be invited to declare, in a positive and obligatory manner, that the general principles before stated should form the basis of the arrangements to be thus concluded.<sup>b</sup>

The principles thus laid down by this celebrated statesman and philosopher were adopted in the final act of the congress, and have since been applied, by detailed conventions, to regulate the navigation of the Rhine, the Scheldt, the Meuse, the Moselle, the Elbe, the Oder, the Weser, and the Po, with their confluent rivers.<sup>c</sup>

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<sup>b</sup> Klüber, *Actes des Wiener Congresses*, 3 Band, § 24.

<sup>c</sup> Art. 108.—*Navigation des rivières*.

Les puissances dont les états sont séparés ou traversés par une même rivière navigable, s'engagent à régler d'un commun accord, tout ce qui a rapport à la navigation de cette rivière. Elles nommeront à cet effet des commissaires, qui se réuniront au plus tard six mois après la fin du congrès, et qui prendront pour bases de leurs travaux les principes établis dans les articles suivans.

By the *Annexe XVI*, to the final act of the congress, the free navigation of the Rhine is confirmed "in its whole

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**Art. 109.—*Liberté de la navigation.***

La navigation dans tout le cours des rivières indiquées dans l'article précédent, du point où chacune d'elles devient navigable jusqu'à son embouchure, sera entièrement libre, et ne pourra, sous le rapport du commerce, être interdite à personne; bien entendu que l'on se conformera aux réglemens relatifs à la police de cette navigation, lesquels seront conçus d'une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les nations.

**Art. 110.—*Uniformité de système.***

Le système qui sera établi, tant pour la perception des droits que pour le maintien de la police, sera, autant que faire se pourra, le même pour tous les cours de la rivière, et s'étendra aussi, à moins que des circonstances particulières ne s'y opposent, sur ceux de ses embranchemens et confluens, qui, dans leur cours navigable, séparent ou traversent différens états.

**Art. 111.—*Tarif.***

Les droits sur la navigation seront fixés d'une manière uniforme, invariable et assez indépendante de la qualité différente des marchandises, pour ne pas rendre nécessaire un examen détaillé de la cargaison, autrement que pour cause de fraude et de contravention. La quotité de ces droits qui, en aucun cas, ne pourront excéder ceux existans actuellement, sera déterminée d'après les circonstances locales qui ne permettent guères d'établir une règle générale à cet égard. On partira néanmoins, en dressant le tarif, du point de vue d'encourager le commerce en facilitant la navigation, et l'octroi établi sur le Rhin pourra servir d'une norme approximative.

Le tarif une fois réglé, il ne pourra plus être augmenté que par un arrangement commun des états riverains, ni la navigation grévée d'autres droits quelconques outre ceux fixés dans le règlement.

**Art. 112.—*Bureaux de perception.***

Les bureaux de perception, dont on réduira autant que possible le nombre, seront fixés par le règlement, et il ne pourra s'y faire ensuite aucun changement que d'un commun accord, à moins qu'un des états riverains ne voulût diminuer le nombre de ceux qui lui appartiennent exclusivement.

**Art. 113.—*Chemins de halage.***

Chaque état riverain se chargera de l'entretien des chemins de halage qui passent par son territoire, et des travaux nécessaires pour la même étendue dans le lit de la rivière, pour ne faire éprouver aucun obstacle à la navigation.

Le règlement futur fixera la manière dont les états riverains devront

course, from the point where it becomes navigable, to the sea, ascending or descending ;" and detailed regulations are provided respecting the navigation of that river, and of the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free, from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the states bordering on that river by an act signed at Dresden the 12th December, 1821. And the stipulations, between the different powers interested in the free navigation of the Vistula and other rivers of ancient Poland, contained in the treaty of

concourir à ces derniers travaux, dans le cas où les deux rives appartiennent à différens gouvernemens.

*Art. 114.—Droits de relâche.*

On n'établira nulle part des droits d'étape, d'échelle ou de relâche forcée. Quant à ceux qui existent déjà, ils ne seront conservés qu'en tant que les états riverains, sans avoir égard à l'intérêt local de l'endroit, ou du pays où ils sont établis, les trouveroient nécessaires ou utiles à la navigation et au commerce en général.

*Art. 115.—Douanes.*

Les douanes des états riverains n'auront rien de commun avec les droits de navigation. On empêchera par des dispositions réglementaires, que l'exercice des fonctions des douaniers ne mette pas d'entraves à la navigation ; mais on surveillera par une police exacte sur la rive, toute tentative des habitans de faire la contrebande à l'aide des bateliers.

*Art. 116.—Règlement.*

Tout ce qui est indiqué dans les articles précédens, sera déterminé par un règlement commun qui renfermera également tout ce qui aurait besoin d'être fixé ultérieurement. Le règlement, une fois arrêté, ne pourra être changé que du consentement de tous les états riverains, et ils auront soin de pourvoir à son exécution d'une manière convenable et adaptée aux circonstances et aux localités.

*Art. 117.—Navigation du Rhin, du Neckar, &c.*

Les réglemens particuliers relatifs à la navigation du Rhin, du Neckar, du Mein, du la Moselle, de la Meuse et de l'Escaut, tels qu'ils se trouvent joints au présent acte, auront la même force et valeur, que s'ils y avoient été actuellement insérés.

the 3d May, 1815, between Austria and Russia, and of the same date, between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the final act of the congress. The same act also extends the general principles adopted by the congress, relating to the navigation of the great rivers, to that of the Po.<sup>d</sup> And, finally, the same principles were also extended to the navigation of the Danube by a treaty concluded between Austria and Russia at St. Petersburg, on the 25th July, 1840.<sup>e</sup>

The interpretation of the above stipulations respecting the free navigation of the Rhine subsequently gave rise to a controversy between the kingdom of the Netherlands and the other states interested in the commerce of that river. The Dutch government claimed the exclusive right of regulating and imposing duties upon the trade and navigation within its own territory, at the places where the different branches, into which the Rhine divides itself, fall into the sea. The expression in the treaties of Paris and Vienna "*jusqu'à la mer*," to the sea, was said to be different in its import from the term "into the sea : " and besides, it was added, if the upper riparian states insist so strictly upon the terms of the treaties, they must be contented with the course of the upper Rhine itself. The mass of waters brought down by that river, dividing itself a short distance above Nimiguen, is carried to the sea through three principal channels, the *Waal*, the *Leck*, and the *Yssel* : the first descending by Gorcum, where it changes its name for that of the *Meuse* ; the second approaching the sea at Rotterdam ; and the third, taking a northerly course by Zutphen and Deventer, empties itself into the Zuyderzee. None of these channels, however, is called the Rhine : that name is preserved to a small stream which leaves the *Leck* at Wyck, takes its course by the learned retreats of Utrecht

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<sup>d</sup> Act Final, art. 114, 96, 118.

<sup>e</sup> Wiener Zeitung, Oct. 22, 1840.

and Leyden, gradually dispersing and losing its waters among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it, by common consent of the powers interested in the question ; and the government of the Netherlands afterwards consented that the Waal, as being better adapted to purposes of navigation, should be substituted for the Leck. But it was insisted by that government, that the Waal terminates at Gorcum, to which the tide ascends, and where, consequently, the Rhine terminates. All that remains of that branch of the river, from Gorcum to Helvoetsluys and the mouth of the Meuse, is an arm of the sea, enclosed within the territory of the kingdom, and consequently subject to any regulations which its government might think fit to establish.

On the other side, it was insisted by the powers interested in the navigation of the river, that the stipulations in the treaty of Paris, 1814, by which the sovereignty of the house of Orange over Holland was revived, with an accession of territory, and by which the navigation of the Rhine was, at the same time, declared to be free "from the point where it becomes navigable to the sea," were inseparably connected in the intention of the allied powers who were parties to the treaty. The intentions thus disclosed, were afterwards carried into effect by the congress of Vienna, which decreed the union of Belgium with Holland, and confirmed the freedom of navigation of the Rhine, as a condition annexed to this augmentation of territory, which had been accepted by the government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea ; and the expression "to the sea," was, in this respect, equivalent to the term "into the sea," since the pretension of the Netherlands to levy unlimited duties upon its principal passages into the sea, would render wholly useless to other states, the

privilege of navigating the river within the Dutch territory.<sup>f</sup>

After a tedious and protracted negotiation, this question was finally settled by the convention concluded at Mentz, March 31st, 1841, between all the riparian states of the Rhine ; by which the navigation of the river was declared free, from the point where it becomes navigable, into the sea, (*bis in die see*,) including its two principal outlets or mouths in the kingdom of the Netherlands, the *Leck* and the *Waal*, passing by Rotterdam and Briel through the first named watercourse, and by Dortrecht, and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys. By the terms of this treaty, the government of the Netherlands stipulates, in case the passages into the main sea by Briel or Helvoetsluys should, at any time, become unnavigable, through natural or artificial causes, to indicate other water courses for the navigation and commerce of the riparian states, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll duties on vessels and merchandize passing through the Netherlands territory, to or from the sea, and also by the different ports of the upper riparian states of the Rhine.<sup>g</sup>

Discussions  
between the  
United States  
and Spain re-  
lating to the  
navigation of  
the river Mis-  
sissippi.

The principles established by the congress of Vienna, and applied to the navigation of the great European rivers had been long before asserted by the government of the United States in respect to the navigation of the Mississippi, at the time when both banks of that river for a considerable distance above its mouth were in possession of Spain.

By the treaty of peace concluded at Paris in 1763, between Great Britain, France and Spain, the province of

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<sup>f</sup> Annual Register for 1826, vol. lxviii. pp. 259-263.

<sup>g</sup> Martens, Nouveau Recueil, tom. ix. p. 252.

Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain; and the boundary between the British and French possessions in North America was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi, was, at the same time, secured to the subjects of Great Britain, from its source to the sea, and the passages in and out of its mouth, without being stopped or visited, or subjected to the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these powers. But Spain having thus become possessed of both banks of the river at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and the right to participate in the navigation of the river, from its source to the sea, was insisted on, by the United States, under the treaties of 1763 and 1783, as well as the law of nature and nations. The dispute was terminated by the treaty of San Lorenzo el Real in 1795, by the 4th article of which his Catholic majesty agreed that the navigation of the Mississippi, in its whole breadth, and its whole length from its source to the ocean, should be free to the citizens of the United States; and by the 22d article, they were permitted to deposit their goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its



source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the treaty of Ghent in 1814, the right of navigating the Mississippi is now vested exclusively in the United States and their citizens.

The right of the United States to participate with Spain in the navigation of the river Mississippi, previously to the cession of Louisiana, was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all the riparian inhabitants. This natural right was found to be acknowledged and protected in all tracts of country united under the same political society, by laying the navigable rivers open to all the inhabitants of their banks. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream be in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The then recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt, from Antwerp to the sea, was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favour of the upper inhabitants must become stronger in the proportion which their extent of territory bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river with its branches afforded many thousands of miles of navigable waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, was not the thousandth part of that extent. This vast portion of the

territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of all the inhabitants, upper and lower, concurred in fact with their respective rights.

If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would indeed be what those writers call an imperfect right, because the modification of its exercise depends, in a considerable degree, on the convenience of the nation through which they were to pass. But it was still a right as real as any other right however well defined; and were it to be refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart of that of those possessing the shores below, and founded in the same natural relations of the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below the American boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from that boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the

water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the river, that the freest use of its navigation might be admitted without their annoyance.<sup>a</sup>

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which it was defined by the treaty of Paris, viz : through its whole breadth. The channel of the Mississippi was remarkably winding, crossing and re-crossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel there was generally an eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means, without which it cannot be used, that is to say that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water.<sup>i</sup> The laws of every country probably did the same. This must have been so understood between France and Great Britain at the treaty of Paris, when a

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<sup>a</sup> The authorities referred to on this head were the following : Grotius, de J. B. ac P. lib. ii. cap. 2, § 11-13. c. 3, §§ 7-12. Puffendorf, lib. iii. cap. 3, §§ 3-6. Wolff's Inst. §§ 310-312. Vattel, liv. 1, § 292, liv. 2, §§ 123-139.

<sup>i</sup> Inst. lib. ii. tit. i. §§ 1-5.

right was ceded to British subjects to navigate the whole river, and expressly that part between the island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all British subjects used the shores habitually for the purposes necessary to the navigation of the river; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

Spain

This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the principal right; as in the case of a vessel damaged, where the mere shore could not be a safe deposit for her cargo till she could be repaired, she may remove into safe ground off the river. The Roman law was here quoted too, because it gave a good idea both as to the extent and the limitations of this right.<sup>k</sup>

The relative position of the United States and Great Britain, in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the acquisition of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and of the St. Lawrence to the point where their

Discussion between the American and British governments respecting the navigation of the St. Lawrence.

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<sup>k</sup> Mr. Jefferson's Instructions to U. S. ministers in Spain, March, 18, 1792. Waite's State Papers, vol. x. pp. 135-140.

northern boundary strikes the river, and Great Britain being in possession of the northern shores of the lakes and of the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45 degrees north to its mouth.

The claim of the people of the United States, of a right to navigate the St. Lawrence to and from the sea, became the subject of diplomatic discussion between the American and British governments in 1826.

On the part of the United States, this right was rested on the same ground of natural law and obvious necessity which had formerly been urged with respect to the river Mississippi. The dispute between different European powers, respecting the navigation of the Scheldt, in 1784, was also referred to in the official correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely *artificial*; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great labour and expense. Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the Lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principle on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn acts of the principal states of Europe. In the treaties concluded at the congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judg-

ment of Europe upon the general question. The importance of the present claim might be estimated by the fact, that the inhabitants of at least eight states of the American union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this, its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756. The claim of the United States to the free navigation of the river St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the treaty of Paris, 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights.<sup>1</sup>

On the part of the British government, the claim was considered as involving the question whether a *perfect* right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on public law as a qualified, occasional exception to the paramount rights of property. They made

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<sup>1</sup> American Paper on the Navigation of the St. Lawrence. Congress Documents, sessions 1827, 1828, No. 43.

a distinction between the right of passage by a river, flowing from the possessions of one nation, through those of another, to the ocean ; and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes besides those of trade,—for objects of war, as well as for objects of peace,—for all nations, no less than for any nation in particular, and be attached to artificial as well as to natural highways. The principle could not therefore be insisted on by the American government, unless it was prepared to apply the same principle by way of reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity, which had been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right. But there was nothing in these writers, or in the stipulations of the treaties of Vienna respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute natural right. These stipulations were the result of mutual consent founded on considerations of mutual interest growing out of the relative situation of the different states concerned in this navigation. The same observations would apply to the various conventional regulations, which had been, at different periods, applied to the navigation of the river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was

made between the new government and that of the mother country.<sup>m</sup>

To this argument it was replied, on the part of the United States, that if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought probably to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which, is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right of navigating both the lakes and the ocean includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the state whose territory is traversed. But in the case of a passage on water, no such injury is sustained. The American government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and Upper Canada, similar to that which

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<sup>m</sup> British Papers on the Navigation of the St. Lawrence, Session, 1827-1828. No. 43.



exists between the United States and the St. Lawrence, the American government would be always ready to apply, in respect to the Mississippi, the same principles which it contended for, in respect to the St. Lawrence. But the case of rivers, which rise and debouche altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in states above, finally discharge themselves within the limits of other states below. In the former case, the question of opening the navigation to other nations depended upon the same considerations, which might influence the regulation of other commercial intercourse with foreign states, and was to be exclusively determined by the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely deprived by the arbitrary caprice of the lower state. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable to avoid controversies, by prescribing certain rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations, the transactions at Vienna, and other analogous stipulations, should be regarded only as the spontaneous homage of man to the great lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contri-

vances to which they have been arbitrarily and unjustly subjected.<sup>a</sup>

We have already seen in what degree the deliberations of the congress of Vienna were affected by the preponderance of the four great powers, Austria, Great Britain, Prussia, and Russia, who had reserved to themselves, by the treaty of Paris, in 1814, the disposition of the territories, the title to which was renounced by France in the same treaty. The efforts of the successive coalitions formed by the great European monarchies against France since the revolution of 1789, were finally crowned with success, and resulted in the formation of an alliance, intended to be permanent, between these four powers, to which France subsequently acceded at the congress of Aix-la-Chapelle, in 1818, constituting a sort of superintending authority in these powers over the international affairs of Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting powers who were also the original parties to the compact called the holy alliance, this union was intended to form a perpetual system of intervention among the European states, adapted to prevent any such change in the internal forms of their respective governments as might endanger the existence of the monarchical institutions which had been reëstablished under the legitimate dynasties of their respective reigning houses. This general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At other times, it was extended to every revolutionary movement pronounced by these powers to en-

§ 21. Alliance of the five great European powers.

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<sup>a</sup> Mr. Secretary Clay's letter to Mr. Gallatin, American minister in London, June 19th, 1826. Session 1827-1828, No. 43.

danger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighbouring states.

§ 22. Inter-  
vention of  
Austria, Rus-  
sia, and Prus-  
sia in the af-  
fairs of Naples,  
1820.

The measures adopted by Austria, Russia, and Prussia, at the congress of Troppau and of Laybach, in respect to the Neapolitan revolution of 1820, were founded upon principles adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states. The British government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law. In the circular despatch addressed on this occasion, to all its diplomatic agents, it was stated, that though no government could be more prepared than the British government was, to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular state or states, or that it could be made prospectively, the basis of an alliance. The British government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations.\*

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\* Lord Castlereagh's circular despatch, January 19th, 1821. *Annual Register*, vol. lxii, pt. ii. p. 737.

The British government also declined being a party to the proceedings of the congress held at Verona in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and to the overthrow of the Spanish constitution of the cortes. The British government disclaimed for itself, and denied to other powers, the right of requiring any changes in the internal institutions of independent states, with the menace of hostile attack in case of refusal. It did not consider the Spanish revolution as affording a case of that direct and imminent danger to the safety and interests of other states, which might justify a forcible interference. The original alliance between Great Britain and the other principal European powers, was specifically designed for the reconquest and liberation of the European continent from the military dominion of France; and, having subverted that dominion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as a union for the government of the world, or for the superintendence of the internal affairs of other states. No proof had been produced to the British government of any design on the part of Spain to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last, and the beginning of the present century, saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards her dominion, by the sword.<sup>p</sup>

§ 23. Intervention of France in the Spanish revolution, 1822.

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<sup>p</sup> Confidential minute of Lord Castlereagh on the affairs of Spain, com-

Both Great Britain and the United States, on the same occasion, protested against the right of the allied powers to interfere by forcible means in the contest between Spain and her revolted American colonies. The British government declared its determination to remain strictly neutral, should the war be unhappily prolonged ; but that the junction of any foreign power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. That it would not enter into any stipulation binding itself either to refuse or delay its recognition of the independence of the colonies ; nor wait indefinitely for an accomodation between Spain and the colonies ; and that it would consider any foreign interference by force or by menace, in the dispute between them, as a motive for recognizing the latter without delay.<sup>9</sup>

The United States government declared, that it should consider any attempt on the part of the allied European powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States. With the existing colonies or dependencies of any European power, they had not interfered, and should not interfere ; but with the governments whose independence they had recognized, they could not view any interposition for the purpose of oppressing them ; or controlling in any other manner their destiny, in any other light than as manifestations of an unfriendly disposition towards the United States. They had declared their

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municated to the allied courts in May, 1823. *Annual Register*, vol. lrv, (Pub. Doc.) p. 93. Mr. Secretary Canning's letters to Sir C. Stuart, 26th January, 1823, and 31st March, 1823, *Ib.* pp. 114, 141.

<sup>9</sup> Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9 Oct. 1823. *Annual Register*, vol. lrv. (Pub. Doc.) p. 99.

neutrality in the war between Spain and those new governments at the time of their recognition, and to this neutrality they should continue to adhere, provided no change should occur which, in their judgment, should make a correspondent change on the part of the United States indispensable to their own security. The late events in Spain and Portugal showed that Europe was still unsettled. Of this important fact no stronger proof could be adduced, than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interpositions might be carried on the same principle, was a question, in which all independent powers, whose governments differed from theirs, were interested; even those most remote, and none more so than the United States.

The policy of the American government in regard to Europe, adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was not to interfere in the internal concerns of any of the European powers; to consider the government *de facto*, as the legitimate government for them; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting in all instances the just claims of every power,—submitting to injuries from none. But with regard to the American continents, circumstances were widely different. It was impossible that the allied powers should extend their political system to any portion of these continents, without endangering the peace and the happiness of the United States. It was therefore impossible that the latter should behold such interposition in any form with indifference.\*

Great Britain had limited herself to protesting against the § 24. Inter-

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\* President Monroe's Message to Congress, 2 Dec. 1823. Annual Register, vol. lxx. (Pub. Doc.) p. 193.

vention of  
Great Britain  
in the affairs  
of Portugal,  
1826.

interference of the French government in the internal affairs of Spain, and had refrained from interposing by force to prevent the invasion of the peninsula by France. The constitution of the Cortes was overturned, and Ferdinand VII restored to absolute power. These events were followed by the death of John VI King of Portugal, in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Don Pedro resigned the latter to his infant daughter Dona Maria, appointing a regency to govern the kingdom during her minority, and at the same time granting a constitutional charter to the European dominions of the house of Braganza. The Spanish government, restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government in the neighbouring kingdom, countenanced the pretensions of Don Miguel to the Portuguese crown, and supported the efforts of his partisans to overthrow the regency and the charter. Hostile inroads into the territory of Portugal were concerted in Spain, and executed, with the connivance of the Spanish authorities, by Portuguese troops belonging to the party of the pretender, who had deserted into Spain, and were received and succoured by the Spanish authorities on the frontiers. Under these circumstances, the British government received an application from the regency of Portugal, claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of Great Britain against the hostile aggressions of Spain. In acceding to that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese constitution was admitted to have proceeded from a legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to force it on the people of Portugal if they were unwilling to re-

ceive it ; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes of the nation. They went to Portugal in the discharge of a sacred obligation contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment of the constitution, but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile aggression of Spain, in countenancing and aiding the party opposed to the Portuguese constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish constitution, was essentially different in its circumstances. France had given to Great Britain cause of war by that aggression upon the independence of Spain. The British government might lawfully have interfered on grounds of political expediency ; but they were not bound to interfere, as they were now bound to interfere, on behalf of Portugal, by the obligations of treaty. War might have been their free choice, if they had deemed it politic in the case of Spain : interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honour.\*

Subsequent to these events the civil war broke out in Portugal in consequence of the claim of Don Miguel against the rights of Dona Maria as recognized by France and Great Britain. The ancient law of Spain, in favour of the succession of females to the crown of that kingdom,

§ 25. Quadruple Alliance between France, Great Britain, Spain and Portugal, 1834.

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\* Mr. Secretary Canning's Speech in the House of Commons, 11th Dec. 1826, Annual Register, vol. lxxviii. p. 192.



had been revived in 1789 by Charles IV under the ministry of Florida Blanca. This act, abolishing the *auto acordado* of Philip V of 1713, was promulgated anew and confirmed, in 1830, by Ferdinand VII who assembled the cortes in 1833, to take the oath of allegiance to his daughter the infanta Maria Isabella Louisa become heiress to the crown. The infant Don Carlos, who had retired into Portugal, and joined Don Miguel, refused to take the oath, and protested at the same time in favour of the contingent rights of himself and his successors in case of the failure of male heirs of the blood of Ferdinand. The kings of Naples and Sardinia also protested against the new order of succession introduced by the pragmatic of 1830, and against the assembling of the cortes for the purpose above mentioned. On the death of Ferdinand VII in 1833, the queen mother, Maria Christina, having been appointed regent of the kingdom by the will of her husband, assumed the reins of government in the name of her infant daughter. The civil war continued in Portugal, the two pretenders Don Miguel and Don Carlos making common cause in the two kingdoms of the peninsula. In the mean time, Don Pedro had abdicated the imperial crown of Brazil, and arrived in Portugal to support the cause of his daughter Dona Maria. His government as regent was recognized by France and Great Britain. These two powers had also recognized the succession of the infanta Maria Isabella Louisa, and the government of the queen regent in Spain. The Spanish government interfered with arms in Portugal in favour of Dona Maria. In this state of things, France, Great Britain, Spain, and Portugal concluded a convention at London on the 22d April, 1834, called the treaty of quadruple alliance.

In the preamble to this convention, it is declared that "her majesty the Queen Regent of Spain, during the minority of her daughter Dona Isabella II, Queen of Spain, and his imperial majesty the Duke of Braganza, Regent of the kingdom of Portugal and the Algarves, in the name of

the Queen Dona Maria II, being impressed with a deep conviction that the interests of the two crowns, and the security of their respective dominions, require the immediate and vigorous exertion of their joint efforts to put an end to hostilities, which, though directed in the first instance against the throne of her most faithful majesty, now afford shelter and support to disaffected and rebellious subjects of the crown of Spain; and their majesties being desirous at the same time to provide the necessary means for restoring to the subjects of each the blessings of internal peace, and to confirm, by mutual good offices, the friendship which they are desirous of establishing and cementing between their respective states, they have come to the determination of uniting their forces, in order to compel the infant Don Carlos of Spain, and the infant Don Miguel of Portugal, to withdraw from the Portuguese dominions. In consequence of this agreement, their majesties the Regents have applied to their majesties the King of the French, and the King of the United Kingdom of Great Britain and Ireland; and their said majesties, taking into consideration the interest they must always feel in the security of the Spanish monarchy, and being animated with the most sincere desire to contribute to the establishment of peace in the peninsula, as well as in all other parts of Europe; and his Britannic majesty, considering moreover the special obligations arising from the ancient alliance subsisting between him and Portugal, their majesties have consented to become parties to the proposed agreement."

The convention contains the following stipulations:

"Art. 1. His imperial majesty the Duke of Braganza, Regent of the kingdom of Portugal, &c. engages to employ all the means in his power to compel the infant Don Carlos to retire from the state of Portugal.

"Art. 2. Her majesty the Queen Regent of Spain, &c. being by the present act invited and requested by his imperial majesty the Duke of Braganza, and having besides just and weighty motives of complaint against the infant Don

Miguel, on account of the support and protection which he has given to the pretender to the crown of Spain, engages to send into the Portuguese territory a corps of Spanish troops, of which the number shall be hereafter determined between the two parties, in order to coöperate with the troops of her most faithful majesty ; and her majesty the Queen Regent engages that the said troops shall be maintained at the expense of Spain, without any charge to Portugal ; the said Spanish troops being nevertheless received and treated in all other respects in the same manner as the troops of her most faithful majesty ; and her majesty the Queen Regent engages that the said troops shall retire from the Portuguese territory as soon as the above mentioned object of the expulsion of the infants shall have been accomplished, and when the presence of the said troops shall no longer be required by his imperial majesty the duke regent in the name of her majesty Queen Dona Maria II.

“ 3. His majesty the King of the United Kingdom of Great Britain and Ireland engages to coöperate by the employment of a naval force in support of the operations which are to be undertaken conformably to the engagements of the present treaty by the troops of Spain and Portugal.

“ 4. In case the coöperation of France shall be judged necessary by the high contracting parties in order completely to accomplish the object of this treaty, his majesty the King of the French engages to act, in this respect as shall be agreed between him and his three august allies.

“ 5. It is agreed between the high contracting parties that, in consequence of the stipulations contained in the preceding articles, a declaration shall be immediately published announcing to the Portuguese nation the principles and the objects of the engagements of the present treaty ; and his imperial majesty the Duke Regent, &c. animated with the most sincere desire of effacing all recollections of the past, and of uniting around the throne of her most faithful majesty the entire nation over which she has

been called by divine providence to reign, declares his intention to proclaim at the same time a general and complete amnesty in favour of all the subjects of her most faithful majesty who shall, within a specified period, have made their submission; and his imperial majesty, &c. declares also his intention to secure the infant Don Miguel, on his retiring from the Portuguese and Spanish territories, a revenue suitable to his birth and rank.

"Art. 6. Her majesty the Queen Regent of Spain, &c. declares by the present article her intention to secure to the infant Don Carlos, on his retiring from the Spanish and Portuguese territories, a revenue suitable to his birth and rank."

In consequence of the moral support given by this treaty to the party of Dona Maria in Portugal, together with the combined efforts of the forces of the two queens and their foreign auxiliaries, the infants Don Carlos and Don Miguel were compelled to quit the kingdom. But Don Carlos, who had been declared by the Spanish cortes to have forfeited his ultimate rights of succession, having re-entered Spain and put himself at the head of the insurgents in Navarre, the Spanish ambassadors at Paris and London demanded from the French and British governments a declaration respecting the value and effect of the treaty of the 22d April. Both governments answered that the object of the treaty not having been accomplished, it still remained in full force, and ought to receive its complete effect; that the articles which had been framed with a view to the then actual state of Portugal should be extended and applied to the actual circumstances of Spain, in such form as might be agreed upon between the four powers, and to which they would immediately apply their attention. The result of this negotiation was a treaty of additional articles to the convention of the 22d April. In the preamble of this additional act signed the 18th August, 1834, it is declared that the contracting parties to the former treaty "having directed their serious attention to the events which have recently

taken place in the peninsula, and being profoundly convinced that in this new state of things, new measures have become necessary in order to completely accomplish the object of the said treaty, have agreed upon the following additional articles to the treaty of the 22d April, 1834.

“ Art. 1. His majesty the King of the French engages to adopt, in that part of his states which borders upon Spain, such measures as may be best adapted to prevent any kind of supplies in men, arms, or munitions of war being sent from the French territory to the insurgents in Spain.

“ Art. 2. His majesty the King of the United Kingdom of Great Britain and Ireland engages to furnish her Catholic majesty with such supplies of arms and warlike stores as her majesty may require, and further to assist her majesty if necessary with a naval force.

“ Art. 3. His imperial majesty the Duke of Braganza, Regent of Portugal and the Algarves, participating the sentiments of his august allies, and desiring to recognize by a just reciprocity the engagements contracted by her majesty the Queen Regent of Spain, in the second article of the treaty of the 22d April, 1834, binds himself to give assistance if it should become necessary, to her Catholic majesty, by all the means which may be in his power in the form and manner which may be hereafter agreed on between their said majesties.

“ Art. 4. The above articles shall have the same force and the same effect as if they were inserted word for word in the treaty of the 22d April, 1834, and shall be considered as making part of the said treaty,” &c.

These additional articles were not only executed on the part of Great Britain by furnishing supplies of arms to the Spanish government, and assisting it with naval forces, but his Britannic majesty, by an order in council of the 1st June, 1835, permitted his subjects to engage in the military service of Spain by exempting them from the general operation of the act of parliament of 1819, forbidding them from enlisting in foreign military service. A corps of vo-

lunteers was consequently raised in England, of which Colonel Evans a member of the British parliament took the command. On the 28th of June a convention was concluded between France and Spain, in virtue of which, the foreign legion hitherto employed by the former, passed into the service of the latter power. A military convention had previously been concluded, under the mediation of the British government, between the generals of the two armies engaged in the civil war in Spain for a mutual exchange of prisoners. Measures were also concerted between the British and French governments for the stationing of cruising squadrons on the coasts of Spain.

Under these circumstances, a discussion took place in the British house of commons, on a motion made by Lord Mahon, respecting the above order in council. The noble lord brought forward his motion on the 23d of June, 1835, and stated that he did not dispute the legality of the order. He would admit also, most readily, that the Queen of Spain was their ally; and that they were bound to deal with her as such in a cordial and liberal spirit. He admitted also the obligations they were required to perform towards their ally, the Queen of Spain, as expressed in the second of the additional articles of the treaty, signed on the 18th of August, 1834. Nor did he then wish to discuss the policy of the quadruple treaty, which the late administration (that of the Duke of Wellington,) had most scrupulously observed and fulfilled, without inquiring whether it was formed on wise political principles. But it was one thing to fulfil all the obligations of a treaty, construing it in a liberal and cordial sense, and quite another thing to be prepared to support an ally at the expense of British treasure and British blood. But even if he were to perceive the justice and necessity of supporting the Queen of Spain, he would prefer the direct and manly course of intervention by sending out a body of the King's troops, under the King's commission, to the indirect, and, in his view, discreditable measure, to which the British government had resorted, of employing

bands of mercenaries. From the period of the revolution, 1688, to the year 1819, there was no instance of any individual being authorized by the King's commission to levy armies in England for the service of a foreign power. In 1819, such an attempt had been made in behalf of the South American republics, but with the assistance of the noble lord himself, (Lord Palmerston,) it had been immediately put down by the enactment of the foreign enlistment bill. Even if they went back to a more distant period than the revolution, they would find but very scanty precedents for a proceeding like the present. There was, indeed, a precedent in the reign of Charles I, in favour of the present practice, when troops were sent out to the succour of Gustavus Adolphus in Germany under the Marquis of Hamilton; but surely they would not be told that Charles was a very constitutional prince when he governed without his parliament. In his view of the question, however, the precedents of such remote times were to be valued rather for historical curiosity than for legislative use. He took up his case from the settlement of the constitution in 1688, and from that time, there was no precedent for the measure which he was then discussing; and he said, that to introduce and encourage such a system as that of mercenary troops, was equally discreditable to the government and injurious to the country. In his opinion, to justify the character of a soldier, it was absolutely necessary that he should come forward at the call, and in the cause of his country. There were cases when the profession of a mercenary soldiery might, perhaps, be considered a necessary evil, such as where they existed in exile from their country, as was the case with the Poles at present. Other instances might also be adduced, as the Jacobites of the last century, and the Catholics who fought at the battle of the Boyne. But he never would sanction by his voice in that house the establishment in Great Britain of a system of *condottieri*. It was disgraceful to Italy in the darkest era of her history,

and it was utterly unworthy of England in the present enlightened age.

The noble lord concluded by moving for "a copy of the order in council, exempting his majesty's subjects, who may engage in the service of Spain, from the provisions of the foreign enlistment act, and copies of all correspondence, which had taken place between the Spanish government and the secretary of state for foreign affairs, relative to the subject."

Lord Palmerston, (secretary of state for foreign affairs,) began by stating, that he should not oppose the production of the papers in question. On the contrary so confident did he feel that the more the conduct of his majesty's government on this subject was investigated, the more would it obtain the approbation of that house and of the country; he should willingly give his support to any motion, which tended to lay more fully before the house and the public the nature of the transaction to which those papers referred, and the grounds, on which it rested. He was glad that the noble lord had cleared away, in some respects, those points on which a difference of opinion might have been supposed to exist between them, and that he had stated it not to be his intention to question either the legality of the order in council, or the policy of the treaty of quadruple alliance. At the same time, he must be permitted to remark, holding, as he did, that the measures under discussion grew out of that treaty as its natural consequence, and were conceived purely in the spirit of it, that he could not but feel great surprise that the noble lord should abstain from questioning the policy of the treaty, when he had so strongly condemned the policy of a measure which flowed from it as a corollary. The noble lord had said that there was no precedent for the course pursued. He (Lord Palmerston) would not dispute with the noble lord as to that point; he wished to found the conduct which the British government should pursue upon the circumstances of the case, and upon the expediency of the time. If that government was wrong



in what it had done, twenty precedents in its favour would not make that case of wrong a case of right ; if it was right, as he contended it was, it was perfectly indifferent whether it had been following a precedent in the course, which it had taken, or boldly establishing a precedent for itself and for others, in time to come, satisfied that when similar contingencies arose, their example would be followed if they had been right, and avoided if they had been wrong. He held that they were right, that they were acting in strict pursuance of the interest of England, and in strict fulfilment of the treaty which they had formed ; and even if they had gone a step farther, if France had sent troops under French generals, and England had sent troops under English generals, on the demand of Spain for assistance, such operations might indeed have rendered necessary fresh articles, in order to regulate the execution of their objects, but they would not have been exceeding the spirit of the quadruple treaty. A question might have arisen, as to whether such a mode of proceeding was expedient or wise ; but no question could have arisen, as to whether the adoption of it implied the entering into a new course of policy, and the departure from the spirit of engagements, which were contracted twelve months since, and which had been before parliament since that period, and which had not called down its disapprobation. It was the interest of England that the cause of the Queen of Spain should be successful ; it was of great interest to her that that alliance, which had been fortunately cemented between the four great powers of the west, England, France, constitutional Spain, and constitutional Portugal ; it was, he repeated, of great interest and importance in the most enlarged views of national policy that that alliance should continue ; and it could only continue by the success of the Queen of Spain. If any man were to tell him that in the event of Don Carlos succeeding in what he (Lord Palmerston) held to be impossible, establishing himself on the throne of Spain, and in restoring all those principles of internal government and of foreign policy

which would inevitably accompany his establishment, if any man were to tell him that such a change in the state of Spain would leave her as efficient an ally for England, in the spirit of the quadruple treaty, as she would continue to be, if the cause of the Queen should triumph, he would tell that individual that he neither understood the interest of England nor the spirit of the treaty in question. They knew that Europe had been, since the revolution of July, 1830, divided, he would not say into hostile, but into different parties, of which the members of each have acted together according to their respective principles; and if they have not met in arms, they have not done so, because of the anxiety which all the governments of Europe have professed and felt to avoid every thing likely to involve Europe in war. The maintenance of peace, not only in the peninsula, but also in Europe, was one great object which that quadruple alliance was intended to effect; and in his opinion there was no better guarantee for the continuance of the peace of Europe than that alliance; an alliance founded not on any selfish views of interest, not for any purpose of national aggrandizement, not from the remotest design of aggression against others, but solely for the purpose of preserving the peace of Europe, and maintaining the independence of the states who were parties to it.

Sir Robert Peel said, that the obligations of the British government, under the treaty in question, were, as he understood them, to furnish arms to Spain; to allow the opportunity of getting Spanish vessels repaired in British harbours; and also to give to Spain, if circumstances required it, the aid of a naval force. He was sure the noble lord opposite would bear out the truth of the observation, when he stated that though the obligation of supplying a naval force to Spain was in case of necessity imposed on England, yet the law of nations did throw great obstacles in the way of the fulfillment of that special obligation. Without a declaration of war, it was with the greatest difficulty that the special obligation of giving naval aid could

be fulfilled without placing the force of such a compact, the performance of which was guarantied on the existence of certain circumstances, in opposition to the general binding nature of international law. Let them take, for instance, a neutral nation requiring arms. Whatever the special obligation imposed on this country might be, it did not warrant us in checking the enterprize of our own countrymen, or preventing that neutral state from receiving a supply of arms. But we had no right, without a positive declaration of war, to stop the ships of a neutral country on the high seas. It was this difficulty of properly adhering to a determination to give just effect to the terms of the quadruple treaty, a difficulty which had been equally felt by the government of Lord Melbourne, and that by which it was succeeded, and which induced the latter to confine its aid to a limited supply of arms, not from any unwillingness to fulfil the obligations under which this country was placed, but on account of those obstacles which were found by all administrations to be insuperable. The Queen of Spain's claims on the cordial assistance of England were the same as those of any other ally. She had been recognized, no matter by what government, (for he considered nothing of such vital importance to the character and interests of the country, as that the engagements entered into by one administration should not be disturbed by another of opposite political principles;) and upon that ground he should have considered it unjustifiable on the part of the administration to which he belonged, to attempt to evade the obligations of the quadruple treaty, (however they might have dissented from the policy by which it had been originally dictated,) or to refuse to carry it into operation in a fair, honourable, and equitable manner. But, still, consistently with the admission that the Queen of Spain was equally entitled as any other friendly power to the cordial assistance and good wishes of this country, he might call in question the policy of a particular act, which for the first time in the recent history of England admitted of direct military inter-

vention in the domestic affairs of another nation. The noble lord had stated that the permanent interests of this country would be promoted by the firm establishment of the Queen of Spain on the throne. That was a doctrine which might, he thought, be carried too far. What limit could be affixed to such a principle? What nation might not find in it a pretext for interfering in the domestic concerns of another? The general rule on which England had hitherto acted was that of non-intervention. The only exceptions admitted to this rule were cases, where the necessity was urgent and immediate; affecting, either on account of vicinage or some special circumstances, the safety or vital interests of the state, and then interference was admitted. To interfere on the vague ground that British interests would be promoted by the intervention; on the plea that it would be for our advantage to see established a particular form of government in a country circumstanced as Spain was; would be to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of a formidable neighbour. It might be said, however, that he was not warranted in applying the terms "direct military interference" to the expedition which had been sanctioned by the government. How did it, in principle, differ from such an interference? It was impossible to deny that an act, which the British government permitted, authorizing British soldiers and subjects to enlist in the service of a foreign power, and allowing them to be organized in this country, was a recognition of the doctrine of the propriety of assisting by a military force a foreign government against an insurrection of its own subjects. When the foreign enlistment bill was under consideration in that house, the particular clause which empowered the king in council to suspend its operation was objected to on this ground,—that if there was no foreign enlistment act, the subjects of this country might volunteer in the service of another, and there could be no particular ground of complaint against them; but that if the king in

council were permitted to issue an order suspending the law with reference to any belligerent nation, the government might be considered as sending a force under its own immediate control.

Lord Palmerston, in reply, stated that the last speaker had admitted the necessity of carrying the quadruple treaty into effect. He begged, therefore, to recall the attention of the house to the circumstances under which that treaty was signed. Don Carlos and Don Miguel were then in Portugal. The claim of Don Carlos to the throne of Spain had been set aside by what was considered throughout Europe as perfectly competent authority. Great Britain immediately acknowledged the right of Isabella to the crown of that country. At that time, the Spanish government wished to send a military force to Portugal, in order to expel from that kingdom Don Carlos, who was there organizing a military force for the purpose of invading Spain. They called on the Portuguese government to expel Don Carlos from Portugal; and the Portuguese government, being unable to do so, declared that they had no objection to allow a Spanish military force to enter Portugal for that purpose. The two powers, having thus come to an understanding on the subject, it became necessary that this understanding should be recorded in a treaty; and it was therefore deemed expedient, by the British and French governments, to adopt the agreement which had been entered into by the governments of Spain and Portugal, and become parties to the treaty concluded between those powers. The quadruple treaty was, in consequence concluded, and its immediate object, as stated in the preamble, was to establish internal peace throughout the peninsula; and the means by which it was proposed to effect that object was the expulsion of the infant Don Carlos and the infant Don Miguel from Portugal. It was clear, therefore, that although the immediate operation of the treaty was confined within the Portuguese dominions, the ultimate object of it was the pacification of the whole peninsula, including Spain as well as Portugal.

When Don Carlos returned to Spain, it was thought necessary to frame additional articles to the treaty, in order to meet the new emergency. One of those additional articles was : " His majesty the King of the United Kingdom of Great Britain and Ireland engages to furnish her Catholic majesty with such supplies of arms and warlike stores as her majesty may require, and further to assist her majesty with a naval force." Now he, (Lord Palmerston) believed that the writers on the law of nations all agreed that any government, thus engaging to furnish arms to another, must be considered to take an active part in any contest in which the latter might be engaged ; and the agreement to furnish a naval force, if necessary, was a still stronger demonstration to that effect. If, therefore, the right honourable baronet objected to the recent order in council, on the ground that it identified Great Britain with the cause of the existing government of Spain, the answer was, that by the additional articles of the quadruple treaty that identification had already been established ; and that one of those articles went even beyond the measure which was at present impugned. As to what had been alleged with respect to the danger of establishing a precedent for the interference of other countries, he would merely observe that, in the first place, this interference, (for he took it to be generally allowed that it was in principle an interference) was founded on a treaty arising out of the acknowledged right of a sovereign, decided by the legitimate authorities of the country over which she ruled. In the case of a civil war, proceeding either from a disputed succession, or from a long revolt no writer on international law denied that other countries had a right, if they chose to exercise it, to take part with either of the two belligerent parties. Undoubtedly it was inexpedient to exercise that right except under circumstances of a peculiar nature. That right, however, was general. If one country exercised it, another might equally exercise it. One might support one party, another the other ; and whoever embarked in either cause must do so

with their eyes open to the full extent of the possible consequences of their decision. He contended, therefore, that the measure under consideration established no new principle, and that it created no danger as a precedent. Every case must be judged by the considerations of prudence which belonged to it. The present case, therefore, must be judged by similar considerations. All that he maintained was that the recent proceeding did not go beyond the spirit of the engagement into which Great Britain had entered, and that it did not establish any new principle; and that the engagement was quite consistent with the law of nations.<sup>†</sup>

We have already seen that the British and French governments had asserted their right of interference in the affairs of the kingdom of Poland and of the free town of Cracow as contracting parties to the treaties of Vienna; and that the British government, in declining to interfere even with its advice in the question as to the decrees of the Germanic diet of 1832, had reserved the right of interference in a proper case. It was only by considerations of prudence, of policy, and of expediency in point of time that both governments were induced to desist from the exercise of the right on these occasions.<sup>‡</sup>

§ 26. Intervention of the five great powers in the Belgic Revolution, 1830.

The most striking example of the actual application of this right is that furnished, in a variety of forms, by the complicated negotiations carried on through the agency of the conference of London in consequence of the Belgic revolution of 1830, and which finally resulted in the establishment of Belgium as a separate kingdom from that of the Netherlands.

Jurisdiction over the controversy between the two states was assumed, in the first instance, by the conference, in

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† Hansard's Parliamentary Debates, (Third Series,) vol. xxviii. pp. 1133-1163.

‡ See § 12.

consequence of the application of the King of the Netherlands to the British government, requesting that the five great European powers might appoint plenipotentiaries to assemble in congress, for the purpose of affecting a conciliatory mediation between the two great divisions of the kingdom. The plenipotentiaries of the five courts, accordingly, assembled in conference at London, on the 4th November, 1830; and, by their first protocol, pronounced the determination of the powers they represented to prevent the further effusion of blood by an entire cessation of the hostilities on both sides.<sup>\*</sup> For this purpose the respective Belgian and Dutch troops were to retire behind the line which, before the epoch of the 30th May, 1814, separated the territories of the United Provinces from those which were united by the treaties of Paris and of Vienna to Holland in order to form the kingdom of the Netherlands.

The proposed armistice was accepted by the King of the Netherlands and by the provisional government of Belgium.

The latter government qualified its assent to the interference of the conference, by expressing the hope that a just feeling of sympathy for the sufferings of Belgium had determined the plenipotentiaries of the five great powers to undertake the philanthropic mission with which they were charged. Fully impressed with this hope the provisional government, desirous of reconciling the independence of the Belgic people with a due respect for the rights of humanity, returned their thanks to the five powers for the initiative which they had taken in order to prevent the further

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<sup>\*</sup> The plenipotentiaries were, on the part of Austria, Prince Esterhazy, of Great Britain, the Earl of Aberdeen, of France, Prince Talleyrand, of Prussia, Baron Bulow, and of Russia, Prince Lieven and Count Mastuzewic. On the accession of Lord Grey's ministry, Lord Palmerston succeeded the Earl of Aberdeen as the British plenipotentiary in the conference.



effusion of blood by an entire cessation of the existing hostilities between Belgium and Holland.<sup>w</sup>

By the protocol of the 20th December, the conference declared, that in forming, by the treaties of 1814 and 1815, the union between Belgium and Holland, the five courts had for their object the establishment of a just balance of power in Europe and the security of the general peace. That the events of the four last months had unfortunately demonstrated that the complete amalgamation, which they wished to operate between the two countries, had not been obtained, and had become impossible to effect in future; that consequently the object of the union was destroyed, and it had become indispensably necessary to resort to other means of accomplishing the end for which the union was intended. But that the separation of Belgium from Holland could not be considered as discharging the former from the performance of her part of the European duties of the kingdom of the Netherlands and of the obligations towards other powers contracted by treaty. The conference would therefore proceed to concert the new arrangements proper to combine the future independence of Belgium with the stipulations of existing treaties, with the interests and security of other states, and with the preservation of the European balance of power. For this purpose, the conference, whilst it continued its negotiations with the plenipotentiary of the king of the Netherlands, invited the provisional government of Belgium to send to London commissaries, furnished with instructions and sufficient full powers, to be consulted and heard upon the said arrangements, which could not, however, in any respect affect the rights of the King of the Netherlands and of the Germanic confederation over the grand duchy of Luxembourg.<sup>x</sup>

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<sup>w</sup> Martens, *Nouveau Recueil*, tom. x. nouvelle série continuée par Martens, tom. i. pp. 70, 76, 85.

<sup>x</sup> Martens, p. 124.

The King of the Netherlands protested against this decision, both as to the form and the substance. As to the form, he insisted that according to the protocol of the congress of Aix-la-Chapelle of the 15th November, 1818, his plenipotentiary ought to have been allowed to participate in deliberations which regarded matters specially connected with the interests of his states.<sup>7</sup> As to the substance, though the King admitted that the conference of London was assembled at his majesty's request, yet he denied that this circumstance conferred upon that body the right of giving to its protocols a direction opposed to the object for which its assistance had been required, and instead of co-operating for the re-establishment of order in the kingdom of the Netherlands to make them tend to the dismemberment of that kingdom.<sup>8</sup>

The provisional government of Belgium refused to submit to this decision so far as respected that country. Its protest admitted that independent Belgium had its portion of European duties to perform, but denied that she was bound by treaties to which she was not a contracting party. The provisional government demanded an immediate guarantee of the free navigation of the Scheldt, the possession of the left bank of that river, of the entire province of Lim-

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<sup>7</sup> The protocol of the congress of Aix-la-Chapelle here referred to contained the following provision: "Si pour mieux atteindre le but ci-dessus énoncé (the maintenance of the general peace) les puissances qui ont concourues au présent acte, jugeaient nécessaire des réunions particulières, soit entre eux soit entre leurs ministres et plénipotentiaires respectifs pour y traiter en commun de leurs propres intérêts, en tant qu'il se rapporte à l'objet de leurs délibérations actuelles, l'époque et l'endroit de ces réunions seront, chaque fois, préalablement arrêtés au moyen de communications diplomatiques; et que, dans le cas où ces réunions auraient pour objet des affaires spécialement liées aux intérêts des autres états de l'Europe, elles n'auront lieu qu'à la suite d'une invitation formelle de la part de ceux des états que les dites affaires concerneraient, et sous la réserve expresse de leur droit d'y participer directement, ou par leurs plénipotentiaires."

<sup>8</sup> Martens, pp. 143, 144.

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bourg, and of the grand duchy of Luxembourg subject to its existing relations with the Germanic confederation.\*

In its meeting of the 20th January, 1631, the conference decided on the basis of separation between Belgium and Holland. The protocol of that date, (art. 1 and 2,) established the boundaries between the two countries according to the *statu quo* of 1790, leaving to Holland all the territory which belonged to her before that date, and assigning to Belgium the remainder of the territories constituting the kingdom of the Netherlands, excepting the grand duchy of Luxembourg, which, it was stated, "being possessed by a different title by the princes of the house of Nassau, forms, and will continue to form a part of the Germanic confederation," and excepting such mutual exchanges of territory as might be mutually effected between the two countries through the mediation of the five courts. The 3d article of the protocol applied the provisions of the final act of the congress of Vienna relating to the free navigation of the European rivers to those which traverse the Belgian and Dutch territories. The 5th and 6th articles declared that Belgium, within the boundaries which should be assigned to her by the basis laid down in the 1st and 2d articles, should form a perpetually neutral state. This neutrality, as well as the integrity and inviolability of the Belgic territory, was guarantied by the five powers, and Belgium was bound to observe that neutrality towards all other states.

By the protocol of the 27th January, the conference *proposed* to the two states to enter into arrangements relating to the finances, commerce, and others rendered necessary by their separation, according to certain general principles laid down by the conference, and the negotiations for that purpose to be conducted under the mediation of the five courts. These propositions were combined with those contained in the protocol of the 20th January in one act,

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\* Martens, p. 142.

under the title of "basis destined to establish the independence and the future existence of Belgium." The protocol of the 27th January terminated, by stating, on the part of the five powers, "that without prejudging other important questions, without deciding upon the sovereignty of Belgium, it was competent for them to declare that the sovereign of that country ought necessarily to correspond to the principles of its existence, satisfy by his personal position the security of the neighbouring states, accept for this purpose the arrangements contained in the present protocol, and be in a situation to secure to the Belgians the peaceable enjoyment of these arrangements."<sup>b</sup>

On the 18th February, the King of the Netherlands assented unconditionally to the bases of separation resulting from the protocols of the 20th and 27th January. He thus retracted his protest against the authority of the conference to determine the separation of Belgium from the kingdom of the Netherlands.<sup>c</sup>

On the 1st February, the Belgic congress protested against the same protocols; and on the same day Count Sebastiani, minister of foreign affairs of the French government, wrote a letter to Mr. Bresson its commissary at Brussels, directing him not to notify to the Belgic government the protocol of the 27th January. This letter concluded as follows: "The congress of London is a *mediation*, and the intention of the King's government is, that it shall never lose this character."

In its protest the Belgic congress recalled to the recollection of the conference that Belgium had only recognized in the conference a mission of a philanthropic character, having for its object to prevent the further effusion of blood, without prejudice to the solution of the political and territorial questions, which were essentially subject to the au-

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<sup>b</sup> Martens, pp. 164-170.

<sup>c</sup> Nothomb, *Histoire de la Revolution Belge*, p. 72

thority of the national congress, and to whom alone belonged their final determination. It further declared that the conference had deviated from the object of its mission in attributing to the five powers the right of finally deciding questions, of which they had merely announced the intention of facilitating the solution, and the authority of determining which had never, as the conference well knew, been alienated by the Belgic congress. And that such a course would be a manifest violation of the principle of non-interference, a fundamental principle of European policy, for the maintenance of which, France and Great Britain especially had taken the initiative on the most solemn occasions.<sup>d</sup>

The Duke of Nemours was elected king of the Belgians by the national congress on the 3d February. In the mean time, the conference of London had, by a secret protocol of the 1st February, pronounced the exclusion of the Dukes de Nemours and Leuchtenberg, as not fulfilling the four conditions required by the protocol of the 29th January. This decision was confirmed by another protocol of the 7th February, which was notified to the Belgic government. The French government had also declared, that it would not recognize the Duke de Leuchtenberg, in case that prince should be elected; and on the 17th of the same month the King of the French refused the Belgic crown for his son, the Duke de Nemours.<sup>e</sup>

On the 19th February, the members of the conference signed a protocol, containing a laboured exposition and defence of the principles, adopted in its principal acts, and applied to the determination of the Hollando-Belgic question.

The most important of these was stated to be, that great principle of public law, according to which, treaties retain

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<sup>d</sup> Martens, p. 195.

<sup>e</sup> Martens, pp. 181-182.

their obligatory power, whatever changes may intervene in the internal organization of states.

In order to judge of the application which the five courts had made of this principle to the affairs of Belgium, it was said to be necessary to recur to the epoch of 1814, at which time the Belgic provinces were in the military occupation of Austria, Great Britain, Prussia, and Russia; and the rights exercised by them over the country were confirmed by the renunciation of France. This renunciation was not made for the exclusive benefit of the occupying powers. These powers, and even France, were then, as now, disinterested in their views upon Belgium; the possession of which they retained, merely for the purpose of disposing of the Belgic provinces in such manner, as might contribute to the establishment of a just balance of power, and the maintenance of general peace in Europe. The union of Belgium with Holland was established with this view. This union was dissolved, and experience had convinced the five powers that it would be impossible to renew and preserve it. But it was not the less their right and their duty to make other arrangements for attaining the same object by different means. For this purpose it was indispensably necessary to begin by putting an end to hostilities between the contending parties. The armistice was the first application of the principle of public law laid down by the conference.

“The second application of the same principle was recorded in the protocol of the 20th December, 1830.

“In acceding to the desire of Belgium for separation and independence, this act reserved the duties which that country would still continue to owe to Europe.

“Each nation has its particular rights; but Europe also has its rights conferred by social order.

“Belgium become independent, found the treaties which govern Europe concluded and in full force. She was bound then to respect them, and could not lawfully infringe them. By respecting them, she would secure the interests

and the repose of the great community of European states ; by infringing them, she would introduce confusion and war. The great powers alone could avert this calamity, and it was their duty to give effect to the salutary maxim that the events, which give birth to a new state in Europe, confer on such new state no more right to change the general system into which it enters, than the alterations which may take place in the condition of an ancient state, authorize such ancient state to consider itself as discharged from its anterior engagements. This maxim of all civilized nations connects itself with that principle by which states survive their governments, and by which the imprescriptible obligations of treaties survive the rulers by whom they are contracted ; this maxim cannot be forgotten without causing to retrograde that civilization, of which public morality and public faith are happily the first consequences and the first securities.

“The protocol of the 20th December was the faithful expression of these truths. It declared that the conference would proceed to discuss and concert the new arrangements proper to combine the future independence of Belgium with the stipulations of existing treaties, with the interests and security of other states, and with the preservation of the European balance of power.”

The protocol of the 19th February went on to state that the protocol of the 20th January was the result of the discussion by the conference of the various communications made to it on the part of the Belgian and Dutch governments. The five courts could not admit on the part of Belgium, the right of making conquests, either from Holland or any other state. In adopting the boundary which separated Belgium from Holland before the union, they denied to Belgium the power of acquiring new territory at the expense of other states ; a power which the five courts had scrupulously denied to themselves, and which they considered as subversive of the public peace and public order.

The protocol of the 27th January, merely enumerated the respective pecuniary charges inherent to the Belgian and Dutch territories, and *proposed* arrangements founded upon a reciprocity of concessions, which would require the *mediation* only of the five powers to facilitate an agreement between the parties.

The King of the Netherlands had assented to the protocols of the 20th and 27th January, whilst the Belgic government had protested against the first of these protocols.

This protest was grounded partly on a right of postliminy which could only belong to an independent state, and Belgium had never been acknowledged as such. It rested also on cessions made to a third power, and not to Belgium. The conference had not abridged the territory of the former Belgic provinces ; it had merely declared and maintained the integrity of the neighbouring states. Far from diminishing the territory of Belgium, the conference had included within its limits the principality of Liege, which had not formerly been annexed to it. All that Belgium could reasonably desire she had obtained : separation from Holland, independence, external security, the guarantee of her independence and neutrality, the free navigation of the rivers which serve for her outlets, and the peaceable enjoyment of her national liberties.

This protocol concluded by stating that the pretensions of the Belgic government were founded on views of conquest, which were incompatible with existing treaties, with the peace of Europe, and consequently with the neutrality and independence of Belgium. The conference, therefore, declared that it adhered to its former determination as fundamental and irrevocable, and recognized the right of other states to take such measures as they should think fit to re-establish, and cause to be respected, their legitimate authority in all the countries belonging to them, to which the above protest laid claim, and which are situated without the Belgic territory declared to be neutral. The protocol also declared that the King of the Netherlands having ad-



hered, without restriction, to the arrangements relative to the separation of Belgium from Holland, any attempt on the part of the Belgic authorities upon the territories which the protocol of the 20th January had declared to be Dutch would be considered by the five powers as a renewal of the contest to which they had determined to put an end.<sup>f</sup>

We have already seen that France, in order to defeat the election of a candidate to the Belgic crown incompatible with the interests of her new dynasty of the house of Orleans, had conciliated the Belgic congress by refusing to ratify the protocol of the 27th January. In pursuing this line of policy she had separated herself from the other great powers represented in the conference. Count Sebastiani addressed, on the 1st March, 1831, a despatch to Prince Talleyrand, containing explanations on the part of the French government respecting the protocol of the 19th February, which the latter was charged to communicate to the conference.

In this communication it was announced, that the French government could not admit the protocol, without protesting against certain consequences which might be inferred from its contents. It was stated that the French government did not intend to discuss the principles of public law and of the law of nations stated in the protocol. Some of these principles were such as had justly obtained the assent of civilized nations, upon which reposed the regular and pacific order of Europe, and which France cordially recognized in all their extent. There were others which might be contested, and which might be too easily liable to abuse in their practical application. Without entering into a controversy, unless for the object which the French government had in view, it would confine itself to protesting against every principle which might countenance the right of armed interference in the internal affairs of the different states of Europe.

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<sup>f</sup> Martens, continué par Murkard, pp. 197-202.

After making this reservation the communication went on to approve, as just, the rule, according to which, the conference had distributed, between Belgium and Holland, the territories of the kingdom of the Netherlands. France also recognized the principle that the grand duchy of Luxembourg, under the sovereignty of the house of Nassau, should remain included in the Germanic confederation. But the boundaries between Belgium, Holland, and the grand duchy of Luxembourg required more accurate definition which would be the result of ulterior explanations. In the mean time, the French government would declare its conviction that the grand duchy ought not to be considered as comprising those territories which the King of the Netherlands had added to its original extent, and that in order to conform to the treaties of 1815 the duchy of Bouillon ought to be detached from the grand duchy, as having been granted to the kingdom of the Netherlands, and not to the house of Nassau, which had only received, as a compensation for its territories on the right bank of the Rhine, the ancient Austrian duchy of Luxembourg. Those territories might then furnish the means of mutual exchanges so as to preserve the contiguity between the respective dominions of each state.

As to the protocol of the 27th January, which regulated the division of the common debt between Belgium and Holland, the French government could not approve as equitable the rule of division proposed by the conference.<sup>s</sup>

On the 17th March, the plenipotentiaries of the four courts answered this communication, and after stating their satisfaction that the French government had approved of the basis of separation indicated in the protocol of the 20th January, proceeded to answer the objections it had taken to some of its supposed consequences.

The conference explicitly denied that any of its protocols

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<sup>s</sup> Martens, p. 226.

countenanced the idea of an armed interference in the internal affairs of Belgium, even in case of a civil war, a case which the French government had seemed to contemplate as one that might authorize such an interference on its part, and which it had also manifested a disposition to exercise in case of the election of the Duke of Leuchtenberg. The conference had indeed declared that Holland should resume its former possessions in all their extent previous to her union with Belgium. The protocol in question, therefore, naturally included the determination of the great powers to maintain the integrity of these possessions against any aggression on the part of Belgium. But it would be impossible to support the position that those powers who, in consequence of the decisions of the protocol, should aid Holland in defending its integrity against the Belgians would thereby exercise an armed interference in the internal affairs of Belgium. No state could arrogate to itself the sole right of fixing its own limits, without the concurrence of others ; of comprehending within those pretended limits the territory of its neighbours ; and of pretending that those who would prevent such aggressions were to be considered as interfering in its internal affairs.

The answer concluded by declaring that the conference had not, in any of its protocols, supposed the employment of force on the part of the five powers, except for the single purpose of establishing an armistice and preventing the renewal of hostilities, and that the French government had offered to coöperate with its naval forces in the accomplishment of this object. But that they would be wanting in their duty, and would compromise their dignity, as well as the general interest of Europe, if they did not oppose with all their forces every aggression on the part of Belgium against the territory of Holland ; and the plenipotentiaries of the four courts were convinced that if Belgium should attempt the invasion of Holland, the French government would concur with them in thinking, that in such a state of things the five powers would be called on to give to Hol-

land all the assistance necessary to maintain her independence and defend the integrity of her territory.<sup>h</sup>

Notwithstanding the former decisions of the conference had been declared to be irrevocable, a new protocol of the 26th June modified, in several particulars, in favour of Belgium, the basis of separation contained in the protocols of the 20th and 27th January, and reserved the question concerning the grand duchy of Luxembourg for ulterior negotiations between the King of the Netherlands and the new sovereign of Belgium.

Prince Leopold of Saxe-Coburg had been elected King of the Belgians on the 4th June, and subsequently accepted the crown, upon condition that the eighteen articles of treaty proposed in the protocol of the 26th June should be adopted by Belgium. This condition having been performed, Prince Leopold was inaugurated as king on the 21st July.

On the other hand, the King of the Netherlands rejected the protocol, and recommenced hostilities by attacking the Belgic territory. This invasion occasioned the armed interference of France, followed by a renewal of the armistice, and of the negotiations for a definitive arrangement between the two countries.

From these negotiations at length resulted the treaty of twenty-four articles, signed on the 15th November, 1831, and subsequently ratified, between the five powers and Belgium. The King of the Netherlands having protested against this arrangement, France and Great Britain united to compel him by force to evacuate the Belgian territory. The three other great powers having refused to take part in measures of coercion for this purpose, an embargo was laid upon all Dutch vessels in British and French ports; the ports of Holland were blockaded by the combined fleet of France and Great Britain; the French army again entered

Treaty of  
1831 for the  
separation of  
Belgium from  
Holland.

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<sup>h</sup> Martens, continué par Murkard, pp. 229-235.

Belgium in the month of November, 1832, and laid siege to the citadel of Antwerp. This fortress having been taken, and delivered into the possession of the Belgic government, the French army once more evacuated the territory of Belgium.

The two states remained in possession of the other places and territories occupied provisionally by them, respectively, until the 14th March, 1838, when the King of the Netherlands declared his willingness to accept the treaty of the 15th November, 1831. A fresh negotiation followed, which finally terminated in the treaty of the 19th April, 1839, between Belgium and Holland, confirmed by the treaty of the same date between these two states and the five European powers.

By the terms of this treaty, (art. 1, 2, 3, 4,) the territories constituting the former kingdom of the Netherlands were divided between Belgium and Holland, according to the *statu quo* of 1790, with a mutual exchange of the *enclaves*, excepting certain districts assigned to the King of the Netherlands in the province of Limburg, either in his quality of Grand Duke of Luxembourg, or to be reunited to Holland, as an indemnity for the cession to Belgium of certain parts of Luxembourg with the consent of the Germanic confederation.

By the 7th article, Belgium was declared to form, within the limits indicated in the above articles, an independent and perpetually neutral state; and bound to observe this neutrality towards all other states.

By the 9th article, the provisions of the final act of the congress of Vienna, from article 108 to 117 inclusive, relative to the free navigation of the rivers, were applied to the streams and navigable rivers which separate or traverse, at the same time, the Belgian and Dutch territory. In respect to the navigation of the Scheldt and its mouths, it was agreed that the Dutch government should be entitled to collect a duty of one florin and a half per ton upon the same; and detailed regulations were agreed to be provided

for the common superintendence of the pilotage, the channels, the buoys, and the fishery of that river and its mouths. It was also agreed that the navigation of the intermediate waters between the Scheldt and the Rhine, passing from Antwerp to the Rhine, and *vice versa*, should remain reciprocally free, and be subject to moderate and uniform duties. The commerce of the Meuse and its branches was also declared to be mutually free, subject to the regulations provided by the convention signed at Mayence the 31st March, 1831, relating to the free navigation of the Rhine, until a special regulation should be adopted between Belgium and Holland.

The 10th article provides that the use of the canals which traverse, at the same time, the two countries, shall be free and common to the inhabitants of both.

The 11th and 12th articles provide for the freedom of the commercial communications by the towns of Maestricht and Sittard with Germany.

By the 14th article it was provided that the port of Antwerp, conformably to the stipulations of the 15th article of the treaty of Paris of the 30th May, 1814, should continue to be exclusively a commercial port.

The other articles provided for the division of the common debt between the two kingdoms, and for the personal and proprietary rights of their respective subjects, whose allegiance was changed by the treaty.

In order to complete our sketch of the changes produced in the arrangements of 1814-15, in consequence of the Belgic revolution of 1830, it is necessary to state that at the time when the French government determined to adhere to the "basis of separation" of the 27th January, 1831, the plenipotentiaries of the other four powers met in conference, and signed a protocol dated the 17th April, 1831, relating to the fortresses constructed since 1815, on the southern frontier of the kingdom of the Netherlands, at the expense of Austria, Great Britain, Prussia and Russia, as a defensive barrier against France. The protocol declares :

“that after having duly examined the question, the four courts were unanimously of opinion that the new situation in which Belgium was placed, with its neutrality recognized and guarantied by France, ought to change the system of military defence adopted for the kingdom of the Netherlands; that the fortresses in question would be too numerous to be kept up and defended by the Belgians; that, besides, the inviolability unanimously conceded to the Belgic territory, afforded a security which did not previously exist; that, finally, a part of these fortresses, erected under different circumstances, may now be demolished. The plenipotentiaries therefore determined, that so soon as there should exist in Belgium a government recognized by the powers participating in the conference of London, a negotiation should be commenced between the four courts and such government, for the purpose of determining which of the said fortresses shall be demolished.”<sup>i</sup>

A convention was accordingly signed at London on the 14th December, 1831, between the four courts and the new Belgic government, by which it was stipulated that the fortifications of Menin, Ath, Mons, Philippeville, and Marienburg should be totally disarmed and demolished; that the demolition should be completed on the 31st December, 1833; and the other fortresses of Belgium not above mentioned should be preserved, the King of the Belgians engaging to keep them constantly in a good state.<sup>k</sup>

Thus was terminated this long and tedious negotiation, which, in the course of its progress, alternately assumed the character of a mediation, of a forcible arbitration, or of an armed interference according to the varying events of the struggle, and the fluctuating views of the powers who were interested in terminating it. It was at last finished by a compromise between the two principles which so long

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<sup>i</sup> Martens, *Nouveau Recueil*, continué par Murkard, tom. i. p. 243.

<sup>k</sup> Martens, continué par Murkard, tom. ii. 410.

menaced, by their apprehended collision, the established order and the general peace of Europe. Neither of these two principles obtained a complete triumph. The Belgic revolution was recognized as an accomplished fact, but its consequences were restricted within the most limited bounds by refusing to it the attributes of the right of conquest and of postliminy, and by depriving Belgium of the greater part of the province of Luxembourg, of the left bank of the Scheldt, and of the right bank of the Meuse. The five great powers representing Europe, consented to the separation of Belgium from Holland, and admitted the former among the number of independent states upon the conditions accepted by her, and which have become the basis of her public law.

The European law of nations is mainly founded upon that community of origin, manners, institutions, and religion which distinguished the Christian nations from those of the Mahommedan world. In respect to the mutual intercourse between the Christian and the Mahommedan powers, the former have been sometimes content to take the law from the Mohammedan, and in others to modify the international law of Christendom in its application to them. Instances of the first may be found in the cases of the ransom of prisoners, the rights of ambassadors, and many others where the milder usages established among Christian nations have not yet been adopted by the Mahommedan powers. On some other points, they are considered as entitled to a very relaxed application of the peculiar principles established by long usage among the states of Europe, holding an intimate and constant intercourse with each other. The Ottoman empire in Europe, Asia, and Africa, consists of a vast variety of populations, the wrecks and fragments of the ancient world. These heterogeneous materials have never been completely blended into one nation. The indelible distinctions of race and religion still remain. *Doris amara suam non intermiscuit undam*. The Turk, the Arab, the Greek, the Slave, the Armenian, the Mahommedan, the

§ 27. Relations of the Ottoman Empire with the other European states.



Greek and Catholic Christian, the Druse, inhabit the same province and the same city without mixing as one people. The Barbary states and the principalities of Wallachia and Moldavia, at all times ; Egypt, under the Mamelukes, and more recently under Mehemet Ali ; and Servia, since the peace of Bucharest, might be considered rather as vassal states than subject provinces.<sup>1</sup>

The territorial arrangements made by the congress of Vienna included only the Christian states of Europe. The Ottoman empire was not represented in the congress, nor included in the system of public law established by it. Yet the integrity and independence of that empire has been considered essential to the maintenance of the general balance of power ever since the crescent ceased to be an object of dread to the western nations of Europe. We have seen that the peace of Szistowe, 1791, between Austria and the Porte, and that of Jassy, 1792, between Russia and the Porte, had been concluded under the mediation of the triple alliance of Great Britain, Prussia and Holland.<sup>m</sup> On the invasion of Egypt by the French republic in 1798, a treaty of defensive alliance was concluded between Russia and the Porte, by which the treaty of Jassy was confirmed, and the integrity of the dominions of both empires was mutually guaranteed. Great Britain acceded in 1799 to this treaty of alliance and guarantee. This treaty having expired in 1806, the Porte, which had in the mean time revived its former amicable relations with France, refused to renew it with Great Britain ; and though it was in form

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<sup>1</sup> " Nature has said it, the Turk cannot govern Egypt, and Arabia, and Curtistan, as he governs Thrace ; nor has he the same dominion in Crimea, which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The sultan gets such obedience as he can. He governs with a loose rein, that he may govern at all ; and the whole force and vigour of his authority in his centre, is derived from a prudent relaxation in all his borders." Burke's Speech on Conciliation with America.

= See Part Third, §§ 10, 11.

renewed with Russia, various subjects of dispute occurred between the two powers, which terminated in open war in 1807. By the treaty of Tilsit of the same year, between France and Russia, the latter ceased to be the ally of Great Britain, and it was stipulated that both the Russian and Turkish troops should evacuate the principalities of Wallachia and Moldavia, and that an armistice should be established until the conclusion of a final peace between the two empires. The hostilities, which had taken place between Great Britain and the Ottoman empire were terminated by a treaty of peace, signed at Constantinople on the 5th January, 1809, by which the former treaties between the two powers were renewed.

The most important article of this treaty is the 11th, by which it is stipulated that "whereas the entry of vessels of war into the canal of Constantinople, including the strait of the Dardanelles and that of the Black Sea, has been at all times prohibited; and as this ancient rule of the Ottoman empire is to be henceforth observed in time of peace towards every power whatsoever, the court of Great Britain also engages to conform to this principle."<sup>a</sup>

In 1809 hostilities were again commenced between Russia and Turkey, which were finally terminated by the treaty of Bucharest in 1812. According to the 4th article of this treaty, the boundary of the Russian empire on the side of Turkey in Europe was extended to the river Pruth, from the side where it enters Moldavia to its confluence with the Danube, and from thence along the left bank of that river to the mouth which falls into the Black Sea at Kilia. The Porte thus ceded to Russia one-third of the province of Moldavia with the fortresses of Choczim and Bender, and the whole of Bessarabia with Ismail and Kilia. By the same article, the navigation of the Danube was to remain common to the subjects of the two empires. The islands

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<sup>a</sup> Martens, *Recueil*, tom. xii p. 160.

hered, without restriction, to the arrangements relative to the separation of Belgium from Holland, any attempt on the part of the Belgic authorities upon the territories which the protocol of the 20th January had declared to be Dutch would be considered by the five powers as a renewal of the contest to which they had determined to put an end.<sup>f</sup>

We have already seen that France, in order to defeat the election of a candidate to the Belgic crown incompatible with the interests of her new dynasty of the house of Orleans, had conciliated the Belgic congress by refusing to ratify the protocol of the 27th January. In pursuing this line of policy she had separated herself from the other great powers represented in the conference. Count Sebastiani addressed, on the 1st March, 1831, a despatch to Prince Talleyrand, containing explanations on the part of the French government respecting the protocol of the 19th February, which the latter was charged to communicate to the conference.

In this communication it was announced, that the French government could not admit the protocol, without protesting against certain consequences which might be inferred from its contents. It was stated that the French government did not intend to discuss the principles of public law and of the law of nations stated in the protocol. Some of these principles were such as had justly obtained the assent of civilized nations, upon which reposed the regular and pacific order of Europe, and which France cordially recognized in all their extent. There were others which might be contested, and which might be too easily liable to abuse in their practical application. Without entering into a controversy, unless for the object which the French government had in view, it would confine itself to protesting against every principle which might countenance the right of armed interference in the internal affairs of the different states of Europe.

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<sup>f</sup> Martens, continué par Murkard, pp. 197-202.

After making this reservation the communication went on to approve, as just, the rule, according to which, the conference had distributed, between Belgium and Holland, the territories of the kingdom of the Netherlands. France also recognized the principle that the grand duchy of Luxembourg, under the sovereignty of the house of Nassau, should remain included in the Germanic confederation. But the boundaries between Belgium, Holland, and the grand duchy of Luxembourg required more accurate definition which would be the result of ulterior explanations. In the mean time, the French government would declare its conviction that the grand duchy ought not to be considered as comprising those territories which the King of the Netherlands had added to its original extent, and that in order to conform to the treaties of 1815 the duchy of Bouillon ought to be detached from the grand duchy, as having been granted to the kingdom of the Netherlands, and not to the house of Nassau, which had only received, as a compensation for its territories on the right bank of the Rhine, the ancient Austrian duchy of Luxembourg. Those territories might then furnish the means of mutual exchanges so as to preserve the contiguity between the respective dominions of each state.

As to the procotol of the 27th January, which regulated the division of the common debt between Belgium and Holland, the French government could not approve as equitable the rule of division proposed by the conference.<sup>8</sup>

On the 17th March, the plenipotentiaries of the four courts answered this communication, and after stating their satisfaction that the French government had approved of the basis of separation indicated in the protocol of the 20th January, proceeded to answer the objections it had taken to some of its supposed consequences.

The conference explicitly denied that any of its protocols

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<sup>8</sup> Martens, p. 226.

countenanced the idea of an armed interference in the internal affairs of Belgium, even in case of a civil war, a case which the French government had seemed to contemplate as one that might authorize such an interference on its part, and which it had also manifested a disposition to exercise in case of the election of the Duke of Leuchtenberg. The conference had indeed declared that Holland should resume its former possessions in all their extent previous to her union with Belgium. The protocol in question, therefore, naturally included the determination of the great powers to maintain the integrity of these possessions against any aggression on the part of Belgium. But it would be impossible to support the position that those powers who, in consequence of the decisions of the protocol, should aid Holland in defending its integrity against the Belgians would thereby exercise an armed interference in the internal affairs of Belgium. No state could arrogate to itself the sole right of fixing its own limits, without the concurrence of others; of comprehending within those pretended limits the territory of its neighbours; and of pretending that those who would prevent such aggressions were to be considered as interfering in its internal affairs.

The answer concluded by declaring that the conference had not, in any of its protocols, supposed the employment of force on the part of the five powers, except for the single purpose of establishing an armistice and preventing the renewal of hostilities, and that the French government had offered to coöperate with its naval forces in the accomplishment of this object. But that they would be wanting in their duty, and would compromise their dignity, as well as the general interest of Europe, if they did not oppose with all their forces every aggression on the part of Belgium against the territory of Holland; and the plenipotentiaries of the four courts were convinced that if Belgium should attempt the invasion of Holland, the French government would concur with them in thinking, that in such a state of things the five powers would be called on to give to Hol-

land all the assistance necessary to maintain her independence and defend the integrity of her territory.<sup>a</sup>

Notwithstanding the former decisions of the conference had been declared to be irrevocable, a new protocol of the 26th June modified, in several particulars, in favour of Belgium, the basis of separation contained in the protocols of the 20th and 27th January, and reserved the question concerning the grand duchy of Luxembourg for ulterior negotiations between the King of the Netherlands and the new sovereign of Belgium.

Prince Leopold of Saxe-Coburg had been elected King of the Belgians on the 4th June, and subsequently accepted the crown, upon condition that the eighteen articles of treaty proposed in the protocol of the 26th June should be adopted by Belgium. This condition having been performed, Prince Leopold was inaugurated as king on the 21st July.

On the other hand, the King of the Netherlands rejected the protocol, and recommenced hostilities by attacking the Belgic territory. This invasion occasioned the armed interference of France, followed by a renewal of the armistice, and of the negotiations for a definitive arrangement between the two countries.

From these negotiations at length resulted the treaty of twenty-four articles, signed on the 15th November, 1831, and subsequently ratified, between the five powers and Belgium. The King of the Netherlands having protested against this arrangement, France and Great Britain united to compel him by force to evacuate the Belgian territory. The three other great powers having refused to take part in measures of coercion for this purpose, an embargo was laid upon all Dutch vessels in British and French ports; the ports of Holland were blockaded by the combined fleet of France and Great Britain; the French army again entered

Treaty of  
1831 for the  
separation of  
Belgium from  
Holland.

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<sup>a</sup> Martens, continué par Murkard, pp. 229-235.

of putting an end to the sanguinary contest, which, by delivering up the Greek provinces and the islands of the Archipelago to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European states, and gives occasion to piracies which not only expose the subjects of the high contracting parties to considerable losses, but besides, render necessary burdensome measures of repression and protection." It then states that the British and French governments, having received a pressing request from the Greeks to interpose their mediation with the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of reëstablishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity, as by the interest of the repose of Europe.

The treaty then provides (art. 1.) that the three contracting powers should offer their mediation to the Porte, by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice as a preliminary condition indispensable to opening any negotiation.

The 2d article provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia.

By the 3d article, it was agreed that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting powers and the two contending parties.

To this public treaty, an additional and secret article was added, stipulating that the high contracting parties should

take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, in the term of one month, the Porte did not accept the proposed armistice, or if the Greeks refused to execute it, the high contracting powers should declare to that one of the two contending parties that should wish to continue hostilities, or to both if it should become necessary, that the contracting parties intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties; and, in fact, would conjointly employ all their means in accomplishing the object thereof, without, however, taking any part in the hostilities of the contending parties; and would transmit eventual instructions, for that purpose, to the admirals commanding their squadrons in the Levant. That if these measures did not suffice to induce the Ottoman Porte to adopt the propositions made by the high contracting powers; or if, on the other hand, the Greeks should renounce the conditions stipulated in their favour, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and in consequence, they authorized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.

The Greeks accepted the proffered mediation of the three powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the cessation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by the French troops; and the independence of Greece was ultimately recognized by the Ottoman Porte under the mediation of the three contracting powers.

In the mean time, war had broken out between Russia § 29. Treaty



of Adrianople  
between Russia  
and the  
Ottoman Porte  
1829.

and Turkey, on account of the refusal of the latter to execute the convention of Ackerman, and of other differences between the two empires. This war was terminated by the treaty concluded at Adrianople in 1829.

By the 2d article of this treaty, Russia restored to the Porte the principalities of Wallachia and Moldavia, Bulgaria, and all the places occupied by the Russian arms in Rummelia.

By the 3d article, the Pruth is to continue to form the boundary between the two empires, from the point where that river touches the territory of Moldavia to its confluence with the Danube. From this point the line of frontier is to follow the course of the Danube to the mouth of St. George, leaving all the islands formed by the different branches of the river, in possession of Russia, and the right bank under the dominion of the Ottoman Porte. It was nevertheless agreed that the right bank, from the point where the branch of St. George separates from that of Soulineh, should remain uninhabited for the space of two *hours* from the river; that there should not be formed within that distance any kind of establishments; and that no fortification or establishment, except quarantine buildings, should be formed upon the islands remaining in possession of Russia. The merchant vessels of the two powers to be at liberty to navigate the Danube, in its whole course, those under the Ottoman flag to enter freely the mouths of Keli, and Soulineh, and the mouth of St. George to remain common to the merchant vessels and vessels of war of the two contracting parties. But the Russian vessels of war, in ascending the Danube, cannot pass beyond the point of its junction with the Pruth.

The 4th article recites, that whereas Georgia, Imeritia, Mingrelia, Goariel and other provinces of the Caucasus had been for a long time united to the Russian empire, which had, also, by the treaty concluded with Persia at Tourkmantchai, in 1828, acquired the Khanats of Erivan and Nakhitchévan, the two contracting parties recognized

the necessity of establishing, between their respective states, upon this line, a well defined frontier adapted to prevent all future discussion. For this purpose, it was agreed to recognize, as the boundary between the Russian and Turkish dominions in Asia, the line, which following the present boundary of Gouriel from the Black sea, goes to the boundary of Imeritia, and from thence in the nearest direction to the point of union of the frontiers of the pashalics of Akhaltzik and Kars with those of Georgia, leaving in this manner to the north and within this line, the town of Akhaltzik and the fort of Akhalkalaki, at a distance of not less than two *hours*. All the countries situate to the south and west of this line, towards the pashalics of Kars and Trebizond, with the greater part of the pashalic of Akhaltzik, then remained under the dominion of the Porte; whilst those which are situated to the north and east of the said line towards Georgia, Imeritia, and Gouriel, as well as the shore of the Black sea from the mouth of the Kuban to the port of St. Nicholas inclusive, remain under the dominion of Russia. The latter power accordingly restored to the Porte the residue of the pashalic of Akhaltzik, the city and pashalic of Kars, the city and pashalic of Bayazid, the city and pashalic of Erzeroum, with all other places occupied by the Russian forces without the above line.

The 4th article stipulated, that the principalities of Moldavia and Wallachia, being placed under the *Suzéraneté* of the Sublime Porte, and Russia having guarantied their prosperity, they should preserve all the privileges and immunities which had been granted to them, by their capitulations, and by the treaties concluded between the two empires, or by the hatti-scherifs issued at different periods. They should consequently enjoy the free exercise of their religious worship, of perfect security, of an independent national administration, and of full liberty of commerce. The additional clauses, necessary to give effect to these stipulations, were inserted in a separate act annexed to the treaty; which provides, among other things, that the Hospodars

should be hereafter elected for life, fixes the annual amount of the tribute to be paid by the principalities to the Porte, and declares that no Mussulman shall be allowed to reside on the left bank of the Danube.

The 6th articles declares, that the circumstances, which had occurred since the conclusion of the convention of Ackerman, not having allowed the Sublime Porte immediately to take measures for carrying into execution the clauses of the separate act relating to Servia, annexed to the 5th article of that convention, the Sublime Porte engaged in the most solemn manner to fulfil them, with the least possible delay, and with the most scrupulous exactness, and to proceed immediately to the restitution of the six districts detached from Servia, so as to secure forever the tranquility and happiness of that faithful nation. The firman ordaining the execution of these clauses was to be officially communicated to the imperial court of Russia within one month from the signature of the treaty.

The 7th article provides, that Russian subjects shall enjoy, throughout the Ottoman empire, as well on the land as the sea, that full and entire liberty of commerce secured by the previous treaties between the two contracting parties. This liberty of commerce shall in no case be infringed, nor under any pretext, by any prohibition or restriction whatsoever, nor in consequence of any regulation or measure, whether of internal administration or legislation. The Russian subjects, vessels, and merchandize to remain secure against all violence and chicane. Their subjects to remain under the exclusive jurisdiction and police of the minister and consuls of Russia. Russian vessels not to be liable to any visitation on the part of the Ottoman authorities, neither on the high seas, nor in any of the ports or roadsteads subject to the dominion of the Sublime Porte; and any merchandize belonging to a Russian subject, after having paid the duties regulated by the tariffs, may be freely sold, deposited in the warehouses of the owner or consignee, or transported on board another vessel, to whatso-

ever nation belonging, without giving notice to the local authorities, and still less demanding their permission. It is expressly agreed that corn coming from Russia shall enjoy these privileges, and that its free transportation shall not suffer the least difficulty or impediment under any pretext whatsoever. The Sublime Porte engages, moreover, carefully to prevent the commerce and navigation of the Black sea, in particular, from being in any manner interrupted. For this purpose, the Sublime Porte recognizes and declares the passage of the canal of Constantinople and the strait of the Dardanelles entirely free and open to Russian merchant vessels, laden or in ballast, whether they come from the Black sea to proceed into the Mediterranean, or from the Mediterranean into the Black sea. In virtue of the same principle, the passage of the canal of Constantinople and the strait of the Dardanelles is declared free and open to all merchant vessels of those powers who are at peace with the Sublime Porte, whether proceeding to Russian ports in the Black sea, or coming from them, and whether laden or in ballast, on the same conditions as are stipulated for vessels under the Russian flag.

Finally the Sublime Porte, recognizing, on the part of the imperial court of Russia, the right of securing this complete freedom of commerce and navigation in the Black sea, solemnly declares, that it shall never be infringed on the part of the Sublime Porte, on any pretext whatsoever. It promises never to seize or detain vessels, laden or in ballast, whether Russian, or belonging to nations with which the Ottoman empire is not in a state of declared war, and passing by the canal of Constantinople and strait of the Dardanelles, in order to proceed from the Black sea into the Mediterranean, or from the Mediterranean to the Russian ports in the Black sea. And if any of the stipulations in the present article should be infringed, without full and prompt satisfaction being given on the demand of the minister of Russia, the Sublime Porte recognizes the right of the imperial court of Russia to consider such an infrac-

tion as an act of hostility, and immediately to grant reprisals against the Ottoman empire.

By the 10th article, the Sublime Porte declares its entire adhesion to the treaty concluded at London the 6th July, 1827, between Russia, Great Britain, and France, for the pacification of Greece; and accedes to the accord of the 27th March, 1829, between the same powers, upon the basis of the preceding treaty, and containing detailed arrangements relating to its definitive execution.

The 15th article provides that all the treaties, conventions, and stipulations, concluded at different epochs between the two contracting parties, except those articles abrogated by the present treaty of peace, are confirmed in all respects, and the two parties engage to observe them religiously and inviolably.<sup>p</sup>

§ 30. Treaty  
of Unkiar  
Skelessi,  
1833.

The Ottoman empire, thus humiliated and weakened by the results of the war with Russia, was soon threatened with a new danger from the ambitious projects of Mehemet Ali, Pasha of Egypt. In 1833, the Egyptian forces under Ibrahim Pasha, after having conquered Syria, passed the Taurus and invaded Asia Minor. The Turkish army was routed in the decisive battle of Koniah, Constantinople itself was threatened with attack, and the Porte demanded in this moment of extreme peril the protection of Austria, Great Britain, and France. These powers hesitated to interfere with arms, but offered the aid of friendly negotiation, and sent their agents to persuade Ibrahim Pasha to advance no farther. Russia took a more decisive course. She placed her forces at the disposal of the Sultan, and a Russian army was landed on the Asiatic side of the Bosphorus to protect the capital against the threatened attack. Peace was finally concluded between the Porte and Mehemet Ali by an arrangement concluded at Kutayah in April, 1833, under the mediation of Great Britain and France.

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<sup>p</sup> Martens, *Nouveau Recueil*, tom. viii. pp. 143-155.

This arrangement was carried into effect by a firman conferring on Mehemet Ali all the pashalics of Syria, with the fiscal administration of the pashalic of Adana, and confirming him in the government of Egypt and Candia.

After having thus consented to the dismemberment of his empire for the aggrandizement of his rebellious vassal, the Sultan concluded at Unkiar-Skellessi, on the 8th July, 1833, a treaty of defensive alliance with the court of Russia.

By the 1st article of this treaty, it was declared, that the sole object of this alliance being the common defence of the respective states of the contracting parties against any attack, they promised to come to an understanding, without reserve, upon all the objects which concern their respective safety and tranquillity, and for this purpose to extend to each other the most effectual aid and assistance.

By the 2d article it was stipulated, that the treaty of peace concluded in 1829 at Adrianople, and the arrangement concluded in 1832 at Constantinople relating to Greece, should be confirmed.

By the 3d article, it was declared that in consequence of the principles of conservation and mutual defence forming the basis of the present treaty of alliance, and of the most sincere desire to ensure the duration, maintenance, and entire independence of the Sublime Porte, his majesty the Emperor of Russia, in the case where circumstances might again determine the Sublime Porte to demand the naval and military assistance of Russia, (although, if it please God, this case is not to be anticipated,) promises to furnish, by land and sea, such troops and forces as the two contracting parties shall judge necessary. It was agreed, that in this case, the land and naval forces, the aid of which should be demanded by the Sublime Porte, should be held subject to its disposition.

The 4th article provided that in case one of the two contracting parties should demand the assistance of the other,

the expenses alone of provisioning the military and naval forces which should be furnished should be paid by that power which should have made the demand.

The 5th article declared, that though the two contracting parties sincerely intended to maintain this engagement for the longest possible term (*jus qu'au terme le plus éloigné*), as it might nevertheless happen that circumstances might hereafter require alterations to be made in this treaty, it was agreed to limit the duration of it to the term of eight years from the date of the ratifications. The two parties, before the expiration of this term, will concert together, according to the state in which things shall then be, respecting the renewal of this treaty.

An additional secret article was annexed to the treaty, by which it was declared that his majesty the Emperor of Russia, wishing to avoid the expense and embarrassment which might be caused to the Sublime Porte by its being called upon to furnish the aid and assistance stipulated by the 1st article of the patent treaty, would not demand this aid and assistance in the case provided, but that the Sublime Porte should, instead of the aid and assistance it was thus bound to furnish according to the principle of reciprocity of the patent treaty, confine its action in favour of the imperial court of Russia to shutting the strait of the Dardanelles, that is to say, not to permit any foreign ship of war to enter that strait, under any pretext whatsoever.

The French government, through its minister at the court of St. Petersburg, stated to that court its profound affliction at the conclusion of this treaty. In the opinion of the French government, it gave to the mutual relations of the Ottoman empire and Russia a new character, against which the powers of Europe had a right to pronounce their opinion. The French government therefore declared, that if the stipulations of this treaty should ultimately produce an armed intervention of Russia in the internal affairs of Turkey, the French government would consider itself free to adopt such

line of conduct as should be suggested to it by circumstances, acting then as if the treaty in question did not exist. It was at the same time stated that a similar declaration had been presented to the Sublime Porte.

To this declaration the Russian cabinet replied, that as the French government had not assigned the reasons of its regret, nor the nature of the objections to which the treaty might be liable, the Russian government could not know how to comprehend them. In fact the treaty of the 8th July was purely defensive ; it had been concluded between two independent powers using the plenitude of their rights ; it was not prejudicial to the interests of any state whatever. What objections then could other powers feel themselves authorized to advance with justice against such an act ? How could they declare it destitute of validity, unless it should enter into their views to subvert an empire which it was the object of the treaty to uphold ? But such could not be the design of the French government. It would be in open contradiction with all its declarations during the late complication of Eastern affairs. The Russian cabinet must therefore conclude that the opinion now announced must be founded upon incorrect data, and that better informed by the communication of the treaty which had recently been made by the Porte to the French government, it would better appreciate the value and utility of a compact concluded in a spirit as pacific as conservative. This compact changed, it was true, the nature of the relations between Russia and the Porte, since it caused to succeed to a long period of hostility relations of intimacy and confidence, in which the Turkish government would henceforth find a guarantee for its stability, and in case of need the means of defence proper to secure its preservation. It was in this conviction, and guided by the most pure and disinterested intentions, that his majesty the Emperor was resolved to fulfil faithfully, if the case should arise, the obligations which the treaty of the 8th July impose on him,



thus acting as if the declaration contained in the note of the French minister did not exist.<sup>2</sup>

§ 31. Treaty  
of the 15th  
July, 1840.

The *casus fœderis* contemplated by the treaty of Unkiar Skellessi did not fail to arise within the term provided for the duration of that treaty. The arrangement of Kutayah was in fact a mere suspension of hostilities, and was not of a nature to satisfy the pretensions of either of the contending parties. The Sultan sought to recover his lost provinces, and Mehemet Ali to assert his independence in order to secure the hereditary dominions of Egypt and Syria for his family. The *status quo*, on which the peace of the Levant, and with it the peace of Europe depended, was thus constantly threatened by the irreconcilable pretensions of the two great divisions of the Ottoman empire. The war again broke out between them in June, 1839. The Turkish army was once more overthrown in the decisive battle of Nezib, which was followed by the desertion of the fleet to Mahemet Ali, and by the death of Sultan Mahmoud II.

In this state of things, the western powers of Europe saw the necessity of interfering to save the Ottoman empire from the double danger with which it was threatened, by the aggressions of Mehemet Ali on the one side, and the exclusive protectorate of Russia on the other. A long and intricate negotiation ensued between the five great European powers, from the voluminous documents relating to which the following general principles may be collected, as having received the formal assent of all the parties to the negotiation, however divergent might be their respective views as to the application of those principles.

1. The right of the great powers to interfere in this contest was placed upon the ground of its threatening, in its consequences, the balance of power and the peace of Europe. The only difference of opinion arose as to the means

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<sup>2</sup> Martens, Nouveau Recueil, Continué par Murkard, Nouvelle Serie, tom. ii. pp. 655-661.

by which the desirable end of preventing all future conflict between the two contending parties could best be accomplished. Great Britain proposed to limit the authority of Mehemet Ali to the hereditary possession of Egypt, as a vassal and tributary of the Ottoman empire; whilst the other provinces possessed by him should be restored to the Sultan, as the only effectual means of securing the empire from this danger. This proposal was accepted by Austria, Russia, and Prussia; whilst France, on the other hand, proposed to regulate the *status quo* in the East, by confirming Mehemet Ali in the hereditary possession of the government of Egypt and Syria under the *suzeraineté* of the Porte.

2. It was agreed that this interference could only take place on the application of the Sultan himself. The French government had proposed that the Eastern question should be discussed in a conference of the five powers to be held at Vienna. The Austrian cabinet objected to a formal conference, as being contrary to the rule laid down by the congress of Aix la Chapelle in 1818, that the five powers would never assume jurisdiction over questions concerning the rights and interests of another power, except at its request, and without inviting such power to take part in the conference. In applying this rule, which was founded on the respect due to the independence of states, to the present case, the presence of an Ottoman plenipotentiary would be necessary to the proposed conference, and the Porte would certainly never be induced to give the powers necessary to proceed with the negotiation in this form. The Austrian cabinet therefore proposed an informal negotiation, of which Vienna should be the seat, but the results of which should be communicated to the Porte through the ambassadors of the five powers at Constantinople. But Russia having declined to take part in the conferences at Vienna, the seat of the negotiations was ultimately transferred to London.\*

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\* Lord Palmerston, to Lord Beauvale, June 28th, 1839. Prince Metter-

3. The death of Sultan Mahmoud being imminent, and the dangers of the Ottoman empire having increased by a complication of disasters, the Austrian cabinet proposed that each of the five powers should solemnly declare its determination to maintain the independence of that empire, under the reigning dynasty; and as a necessary consequence of this determination, that neither of them should seek to profit by the present state of things to obtain an increase of territory, or an exclusive influence. This proposition was readily assented to by the British cabinet, whilst France at the same time proposed an equivalent declaration.\* This engagement was subsequently recorded in a protocol signed on the 17th of September, 1840, by the plenipotentiaries of the four great European powers parties to the treaty of the 15th July of that year.

4. In a certain stage of these negotiations it had been proposed by the British cabinet that the great European powers should expressly guaranty the integrity of the Ottoman dominions. This proposal was, at first, opposed by Russia, upon the ground that such an obligation would prove too onerous, as it would be found to involve the task of protecting the Porte against every rebellious pasha who might rise in insurrection in any part of the empire. It was subsequently proposed by the Ottoman Porte itself, and objected to by the Austrian cabinet, as being at once morally and materially impracticable. A state ought never to accept, it was said, and therefore still much less request, of other states, a service, for which it is unable to offer in return a strict reciprocity. In the circumstances where it is otherwise, the state which accepts the favour, loses by so doing the flower of its independence. A state placed under a guarantee becomes a mediatized state; for, in or-

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nich to Count Appony, June 14, 1839. Correspondence relative to the affairs of the Levant, pt. i. pp. 118-120.

\* Duc de Dalmatie to Baron de Bourquenay, July 17, 1839. Correspondence, t. pi. p. 173.

der that a guarantee may be given, it is requisite that the state which applies for it should make an act of submission to the will of the state which will have the charge of its defence. The guarantying state, to be of any use, must assume the office of a protector; and if one protector is, to say the least of it, inconvenient, many protectors become an insupportable burden. There was only one known form of attaining the object of the guarantee, and still avoiding the inconvenience of the thing itself; that form was a defensive alliance. Now, it was asked, is that what the divan wants? If so, it must propose it, but it was not believed the proposal would meet with a favourable result.<sup>†</sup>

The British government concurred in opinion with the Austrian cabinet that it would not, after the treaty of the 15th July had been carried into execution, be expedient for the European powers to enter into a guarantee of the integrity of the Turkish empire, yet the British government could not entirely concur with the Austrian cabinet in the reasons which it had given for that opinion.

The British government admitted, that when a single power guaranties another, such an engagement does place the weaker power in a state of dependence upon the stronger, which must derogate from the freedom of action of the weaker power, and must give the stronger one a preponderant influence. But this effect would not be produced in the same degree when the guarantee is given by several powers; because it is probable that those powers would have different wishes, and these opposite and conflicting impulses would destroy each other.

At all events, Austria had not always held this opinion; because she joined with the other four powers in guarantying, not merely the integrity, but the independence of Bel-

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<sup>†</sup> Prince Metternich to Baron de Sturmer, April 20, 1841. Correspondence, pt. iii. p. 401.

gium ; proving thereby, that she did not consider a guarantee of integrity as being necessarily destructive of independence ; and the result in the case of Belgium, had not shown that the guarantee had deprived Belgium of any portion of her independence.

In the present case of Turkey, if the *status quo* of 1839, had been maintained, and if Mehemet Ali had been left in the occupation of Syria, the Sultan would have been constantly exposed to an imminent and serious danger, and these might have been a reason why the great powers should have entered into engagements to come to his assistance whenever wanted ; but now that Mehemet Ali had been driven back into Egypt, and the Sultan had recovered possession of Syria and his fleet, and might by good management and perseverance make himself stronger by land and by sea than Mehemet Ali could possibly be, there seemed to be no standing danger, against which it could be necessary for the alliance to guaranty the Sultan ; and therefore it would, on many accounts, be better that Turkey and the other powers of Europe should stand towards each other in the ordinary relation in which independent states reciprocally stand.<sup>a</sup>

5. The Russian cabinet, in accepting the British plan for settling the affairs of the East, stated, that in order to carry that plan into execution by an armed intervention, it would be necessary to provide against the contingent danger of Ibrahim Pasha marching upon Constantinople, whilst the allied naval forces were attempting to coerce Mehemet Ali by the blockade of his ports on the coasts of Syria and Egypt. It was therefore proposed that in this contingency, a Russian naval force should occupy the Bosphorus, and a Russian military force land on the Asiatic side of the strait. The Russian government proposed that the aid to be given,

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<sup>a</sup> Lord Palmerston to Lord Beauvale, May 10, 1841. Correspondence, pt. iii. p. 403.

if necessary, by Russia to the Sultan, should be given, not in virtue of the separate obligations of the treaty of Unkiar Skellessi, but in virtue of the arrangements about to be entered into between the European powers and the Sultan : that this succour, therefore, would be an act of the alliance, and would retire as the force of the alliance, whenever the purpose for which it came should have been fully accomplished. It was also proposed that an article should be inserted in the treaty of intervention, recognizing the permanent rule of the Ottoman empire, as understood by the British government, that whilst Turkey is at peace, the straits both of the Bosphorus and the Dardanelles should be considered as shut against the ships of war of all nations, so that the Bosphorus should be considered as much closed against Russian ships of war as the Dardanelles against the ships of war of other powers. It was also further proposed, on the part of Russia, that if the convention should be concluded on the basis proposed, the Emperor would agree not to renew the treaty of Unkiar Skellessi.

To this proposition it was replied, on the part of the British government, that its opinion respecting the navigation of the Bosphorus and Dardanelles by ships of war of foreign nations rested upon a general and fundamental principle of the law of nations. Every state is considered as having territorial jurisdiction over the sea which washes its shores as far as three miles from low water mark ; and, consequently, any strait, which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than six miles wide ; and consequently the territorial jurisdiction of the Sultan extends over both of those straits ; and the Sultan has a right to exclude all foreign ships of war from those straits, if he should think proper so to do. By the treaty of 1809, Great Britain acknowledged this right on the part of the

Sultan, and promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British government was of opinion that the exclusion of all foreign ships of war from the two straits would be more conducive to the maintenance of peace, than an understanding that the straits in question should be a general thoroughfare, open at all times to ships of war of all countries; but, whilst it was willing to acknowledge by treaty, as a general principle, and as a standing rule, that the two straits should be closed for all foreign ships of war, it was of opinion, that if for a particular emergency, one of those straits should be opened for one party, the other ought, at the same time, to be opened also for other parties; in order that there should be the same parity between the condition of the two straits, when open and shut; and, therefore the British government would expect that in that part of the proposed convention, which should allot to each power its appropriate share of the measures of execution, it should be stipulated that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.▼

This decision of the British government was taken *ad referendum* by the Russian plenipotentiary, and the Russian government subsequently signified its assent to the British proposition, that if the contingency in question should arise, the flag of each of the powers, that might wish to participate in the common operation, should be represented by sending a certain number of vessels in order to prove that they have all united for the defence and protection of the capital of the Ottoman empire. A special arrangement should ascertain the number of their vessels, and the limits within which they should cruize in the sea

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▼ Lord Palmerston to the Marquis of Clanricarde, Oct. 25, 1839. Correspondence, pt. i. p. 439.

of Marmora near the straits of the Dardanelles, in order to avoid any contact with the Russian forces destined to place Constantinople in security against any attack from the side of the Bosphorus.\*

A convention was at last concluded upon these bases at London, on the 15th July, 1840, between the great European powers, exclusive of France, for the pacification of the east, to which the Ottoman Porte also became a party.

The preamble of this convention stated, that his highness the Sultan having addressed himself to their majesties the sovereigns of Great Britain, Austria, Prussia, and Russia, to ask their support and assistance in the difficulties in which he found himself placed, by reason of the hostile proceedings of Mehemet Ali, Pasha of Egypt; difficulties which threatened with danger the integrity of the Ottoman empire, and the independence of the Sultan's throne: their said majesties, moved by the sincere friendship which subsisted between them and the Sultan; animated by the desire of maintaining the integrity and independence of the Ottoman empire, as a security for the peace of Europe; faithful to the engagements which they contracted by the collective note presented to the Porte by their representatives at Constantinople on the 27th July, 1839; and desirous, moreover, to prevent the effusion of blood, which would be occasioned by a continuance of the hostilities which had recently broken out in Syria, between the authorities of the Pasha of Egypt and the subjects of the Sultan; their said majesties and his highness the Sultan had resolved, for the aforesaid purposes, to conclude together a convention, &c.

The 1st article of this convention states, that the Sultan having come to an agreement with the four powers as to the conditions of the arrangements which it was his inten-

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\* Count Nesselrode to M. de Kisselef, Nov. 10, (22,) 1839, Correspondence, pt. i. p. 506.



tion to grant to Mehemet Ali, and which were specified in a separate act thereunto annexed ; the four powers engage to act in perfect accord, and to unite their efforts, in order to determine Mehemet Ali to conform to that arrangement ; each of the parties reserving to itself to coöperate for that purpose, according to the means of action which each might have at its disposal.

The 2d article provides, that if the Pasha of Egypt should refuse to accept this arrangement, the four powers engage to take, at the request of the Sultan, measures concerted and settled between them, in order to carry the arrangement into effect. In the mean while, the Sultan having requested his said allies to unite with him, in order to assist him to cut off the communication by sea, between Egypt and Syria, and to prevent the transport of troops, horses, arms, and warlike stores of all kinds from the one province to the other ; Great Britain and Austria engaged to give immediately, to that effect, the necessary orders to their naval commanders in the Mediterranean. These two powers further engaged, that the naval commanders of their squadrons, should, according to the means at their command, afford, in the name of the alliance, all the support and assistance in their power to those subjects of the Sultan who might manifest their fidelity and allegiance to their sovereign.

The 3d article provides, that if Mehemet Ali, after having refused to submit to the conditions of the arrangement above mentioned, should direct his land or sea forces against Constantinople, the four powers, upon the express demand of the Sultan, addressed to their representatives at Constantinople, agreed, in such case, to comply with that sovereign's request, and to provide for the defence of his throne by means of a coöperation agreed upon by mutual consent, for the purpose of placing the two straits of the Bosphorus and Dardanelles, as well as the capital of the Ottoman empire, in security against all aggression. And it was further agreed, that the forces which might be sent,

in virtue of such concert, should there remain so employed so long as their presence should be required by the Sultan ; and when he should deem their presence no longer necessary, the said forces should simultaneously withdraw, and return to the Black sea and to the Mediterranean respectively.

The 4th article declared that it was expressly understood that the coöperation mentioned in the preceding article, and destined to place the straits of the Dardanelles and of the Bosphorus, and the Ottoman capital, under the temporary safeguard of the contracting parties against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express demand of the Sultan, and solely for his defence, in the single case above mentioned ; but it was agreed, that such measure should not derogate in any degree from the ancient rule of the Ottoman empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign powers to enter the straits of the Dardanelles, and of the Bosphorus. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his empire ; and so long as the Porte was at peace, to admit no foreign ship of war into the straits of the Bosphorus and of the Dardanelles ; on the other hand, the four powers engaged to respect this determination of the Sultan, and to conform to the above mentioned principle.

The separate act annexed to the convention stated the intention of the Sultan to grant to Mehemet Ali the conditions of the arrangement detailed as follows :

1. The Sultan promised to grant to Mehemet Ali, for himself and for his descendants in the direct line ; the administration of the pashalic of Egypt, and the administration of the southern part of Syria for his life, with the title of Pasha of Acre, and with the command of the fortress of St. Jean d'Acre. In making these offers, the Sultan at-

tached to them, however, the condition that Mehemet Ali should accept them within the space of ten days after communication thereof made to him, and that he should give the necessary instructions to withdraw his land and sea forces from all other parts of the Ottoman empire not comprised within the limits of Egypt and the pashalic of Acre.

2. If Mehemet Ali did not accept the above arrangement within the term prescribed, the Sultan would then withdraw the offer of the life administration of the Pashalic of Acre; but would still consent to grant him the hereditary administration of the Pashalic of Egypt, provided his acceptance should be signified within another further term of ten days, and provided he consented to withdraw his military and naval forces within the limits of that pashalic.

3. The annual tribute to be paid to the Sultan by Mehemet Ali should be proportioned to the greater or less amount of territory of which the latter might obtain the administration, according as he accepted the first or second alternative.

4. It was understood that in either alternative, Mehemet Ali should be bound to deliver up the Turkish fleet to the agent of the Sultan before the expiration of the specific period of ten or twenty days.

5. All the treaties and all the laws of the Ottoman empire to be applicable to Egypt in the same manner as to every other part of the Ottoman empire. But the Sultan consented, that on condition of the regular payment of the tribute above mentioned, Mehemet Ali and his descendents should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established; it being moreover understood that the Pasha should defray all the expenses of the civil and military administration.

6. The military and naval forces maintained by the Pasha, forming part of the forces of the Ottoman empire, should always be considered as maintained for the service of the state.

7. If, at the expiration of twenty days after communica-

tion made to Mehemet Ali (according to the 2d stipulation) he should not accede to the proposed arrangement by accepting the hereditary Pashalic of Egypt, the Sultan would consider himself at liberty to withdraw that offer, and to follow in consequence, such ulterior course as his own interests, and the counsels of his allies might suggest to him.\*

Mehemet Ali having refused to accept the above mentioned arrangement within the term prescribed, sentence of deprivation of his pashalics was formally pronounced against him by the Porte; and the treaty of the 15th July was carried into execution by expelling the Egyptian forces from Syria, Candia, and Arabia, and those provinces were restored to the Sultan. Mehemet Ali having subsequently made his submission, the sentence of deprivation was revoked, and the hereditary Pashalic of Egypt was conferred upon him, by an imperial firman, upon conditions substantially the same with those contained in the separate act annexed to the treaty.

The objects of the treaty having been thus accomplished, the plenipotentiaries of the four great powers, contracting parties to the same, assembled in the conference of London on the 10th July, 1841, and signed a protocol, stating that the difficulties in which the Sultan was placed, and which decided him to apply for the support and assistance of Austria, Great Britain, Prussia, and Russia, being now removed and Mehemet Ali having made towards the Sultan the act of submission which the treaty was designed to bring about, the representatives of the courts parties to the same had considered, that independently of the execution of the temporary measures resulting from that convention, it was essential to record in the most formal manner, the respect due to the ancient rule of the Ottoman empire, in virtue of which it had been at all times prohibited for ships of war of foreign powers to enter into the straits of the Dardanelles and of

§ 32. Treaty of the 13th July, 1841, relating to the entrance of the Dardanelles and Bosphorus by foreign ships of war.

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\* Correspondence, pt. i. p. 691-697.

the Bosphorus. This arrangement being from its nature one of general and permanent application, the respective plenipotentiaries, provided with the orders of their courts to this effect, had been of opinion, that in order to manifest the agreement and union which regulate the intentions of all the courts in what concerns the maintenance of the peace of Europe, it would be proper to record the respect which is due to the above mentioned principle, by means of an arrangement in which France should be invited to concur, at the invitation and agreeably to the wish of the Sultan. This arrangement being calculated to afford to Europe a pledge of the union of the five powers, her Britannic majesty's principal secretary of state for foreign affairs, agreeably to an understanding with the plenipotentiaries of the four powers, undertook to bring the matter to the knowledge of the French government, requesting it to take part in such an arrangement.†

A convention was accordingly concluded at London on the 13th July, 1841, between the five great European powers and the Ottoman Porte ; by the first article of which the Sultan on one part, declared his firm resolution to maintain, in future, the principle invariably established as the ancient rule of his empire ; and that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said straits. The five powers, on the other part, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle.

By the 2d article it was provided that in declaring the inviolability of this ancient rule of the Ottoman empire, the Sultan reserved the faculty of granting as heretofore *firmans* allowing the passage to light armed vessels employed according to usage in the service of the diplomatic legations of friendly powers.

By the 3d article the Sultan also reserved the faculty of

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† Correspondence, pt. iii. p. 474.

notifying to all the powers in amity with the Sublime Porte the convention, and of inviting them to accede to it.

By this act the principle of the law of nations relating to territorial jurisdiction over adjoining seas, as applicable to the interior waters of the Ottoman empire, became incorporated into the written public law of Europe.

The war declared by the United States against Great Britain in 1812 originated in the same controverted questions of the maritime law of nations, relating to the respective rights of belligerent and neutral states, which had given rise to the armed alliance of the northern powers of Europe against Great Britain in 1780 and 1800. The United States complained of the capture and confiscation of their vessels under the rule of the war of 1756 relating to the colonial and coasting trade of an enemy, and under the British orders in council establishing a blockade of the European continent, in alleged retaliation of the French decrees of Berlin and Milan declaring the British islands in a state of blockade. Besides this interruption of their neutral commerce, the United States also alleged, as the ground of hostilities, the impressment of their seamen from on board their vessels on the high seas, under the pretext of exercising the right of search for British subjects in virtue of the municipal laws of Great Britain. The war, commenced on these grounds, was terminated by the treaty of peace concluded at Ghent in 1814, on the basis of the *status quo ante bellum*, whilst the questions of maritime law in which the war had originated were passed over in complete silence.

§ 33. Discussions between the American and British governments relating to the right of search for the suppression of the African slave trade.

The treaty of Ghent declared (art. 10) that "whereas the traffic in slaves is irreconcilable with the principles of humanity and justice : and whereas both his Britannic majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object."

It will be remembered that a similar declaration relating

to the African slave trade had been adopted by the congress of Vienna about the same time.<sup>2</sup> As the subject matter of these declarations ultimately led to serious discussions between the American and British governments, growing out of the former, of the right of visitation and search to the suppression of the slave trade, it becomes necessary for the elucidation of the question to revert to the origin and progress of the trade so far as the United States and Great Britain are both concerned.

The testimony of authentic history attests the notorious facts, that the African slave trade was carried on by the British nation for more than two centuries under the patronage of its government, and protected by charters of monopoly and public treaties, not for the supply of their own colonies merely, but those of France and Spain, before even the slightest effort had been made to awaken the public mind to a sense of its enormous iniquity. Under the first Stuart kings of England, charters were granted incorporating joint-stock companies, endowed with the exclusive privilege of carrying on trade with Africa. The operations of these companies were sustained by all the power and patronage of the British government, both in legislative measures and diplomatic acts. The memorable treaty of Utrecht, 1713,—by which the Spanish succession-war was terminated, the balance of power in Europe confirmed, and the maritime law of nations definitively settled,—so far as depending on conventions, granted “to her Britannic majesty, and to the company of her subjects established for that purpose (the South Sea Company,) as well the subjects of Spain, as all others being excluded, the contract for introducing negroes into several parts of the dominions of his Catholic majesty in America (commonly called *El*

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<sup>2</sup> Vide ante, § 19.

*pacto de el Assiento de negros*,) at the rate of 4800 negroes yearly, for the space of thirty years successively.”<sup>a</sup>

In the debate which took place in the house of commons on the 16th of June, 1815, relating to the negotiations at the congress of Vienna respecting this matter, Lord Brougham stated, that “by the treaty of Utrecht, which the execrations of ages have left inadequately censured, Great Britain was content to obtain, as the whole price of Ramillies and Blenheim, an additional share of the accursed slave trade.”

Mr. C. Grant said in the house of commons on the 9th February, 1818, that “In the beginning of the last century we deemed it a great advantage to obtain by the Assiento contract the right of supplying with slaves the possessions of that very power we were now paying for abolishing the trade. During the negotiations which preceded the peace of Aix-la-Chapelle we higgled for four years longer of this exclusive trade; and in the treaty of Madrid we clung to the last remains of the Assiento contract.”<sup>b</sup>

The principal object, however, of the slave trade, so long carried on by Great Britain, was the supply of her own colonies in North America and the West Indies. The British settlers in the colonies, which now form the five southern states of the American Union, were naturally tempted by the example of the West Indian planters to substitute for white servants the labour of African slaves, better fitted by their physical constitutions to endure the toil of cultivating, under a burning sun, the rich soil of that region. The desire to obtain an ample supply of these labourers was powerfully stimulated by the encouragement of the British Government, which sought by this means, at once, to increase the amount of colonial produce for home consumption and re-exportation, and to discourage the emigration of its Eu-

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<sup>a</sup> Treaty of commerce and navigation, signed at Utrecht, 1713, between Great Britain and Spain, art. 12. (Dumont, tom. viii. pt. ii. p. 344.)

<sup>b</sup> Walsh's Appeal from the Judgments of Great Britain respecting the United States, second edition, p. 327.



ropean subjects to the New World, where they were but too much disposed to seek refuge from the oppression of the Restoration. "On the accession of Charles II," says Davenant, "a representation being made to him that the British plantations in America were by degrees advancing to such a condition as necessarily required a greater yearly supply of servants and labourers than could well be spared from England, without the danger of depopulating his majesty's native dominions, his majesty did (upon account of supplying these plantations with negroes) publicly invite all his subjects to the subscription of a new joint stock for recovering and carrying on the trade to Africa."<sup>c</sup>

The southern colonists yielded with too much facility to the temptation thus held out to them of being relieved from the wasting labour of the field, under a burning sun, and with respect to one particular species of cultivation, (that of rice,) in a marshy soil, whose pestilent exhalations are fatal to whites; whilst they were thus left with leisure and the means of providing for their defence against the incursion of a savage foe.<sup>d</sup> Not so with the settlers of New England. They stood less in need of this class of servants, and, therefore, more readily listened to the voice of conscience. The colony of Massachusetts, as early as 1645, enacted a law prohibiting the buying and selling of slaves, "except those taken in lawful war, or reduced to servitude for their crimes by a judicial sentence;" and these were to be allowed "the same privileges as were allowed by the *law of Moses*." This prohibition, with its exception conceived in the spirit of Puritanism, must have fallen into disuse, since we find that in 1703 the legislature of Massachusetts imposed a heavy duty on negroes imported into that colony. And in 1767 they attempted to establish a duty equivalent to the absolute prohibition of the introduction of

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<sup>c</sup> Davenant's Works, vol. v. *Reflections on the African Slave Trade*.

<sup>d</sup> Walsh's Appeal, p. 310.

slaves, which was defeated by the opposition of the council appointed by the crown. Had the bill passed the two branches of the legislature, it must have been ultimately destroyed by the negative of the governor, as all the royal governors had express instructions from the British cabinet to reject bills of that description.\* The colonial legislatures of Pennsylvania and New Jersey followed the example of New England in seeking to interdict the further importation of African slaves by prohibitive duties. But the influence of the African Company, and other slave traders in the mother country, was ever found adequate to cause their enactments to be rejected by the crown. It is stated by Lord Brougham, in that celebrated work on the "Colonial Policy of the European Powers," which, at an early period of his brilliant career, earned for him the highest reputation in economical science, that "Every measure proposed by the colonial legislatures, which did not meet the entire concurrence of the British cabinet, was sure to be rejected in the last instance by the crown. In the colonies, the direct power of the crown, backed by all the resources of the mother country, prevented any measure obnoxious to the crown from being carried into effect, even by the unanimous efforts of the colonial legislature. If examples were required, we might refer to the history of the abolition of the slave trade in Virginia. A duty on the importation of negroes had been imposed, amounting to a prohibition. One assembly, induced by a temporary peculiarity of circumstances, repealed this law by a bill which received the immediate sanction of the crown. But never afterwards could the royal assent be obtained to a renewal of the duty; although, as we are told by Mr. Jefferson, all manner of expedients were tried for this purpose, by almost every subsequent assembly that met under the colonial govern-

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\* See Massachusetts Hist. Coll. for Belknap's account of slavery in that province. See also, Gordon's Hist. of the Am. Rev. vol. v. letter 2.

ment. The very first assembly that met under the new constitution finally prohibited the traffic."<sup>f</sup>

Edmund Burke, in his celebrated speech on conciliation with America, recognized her "refusal to deal any more in the inhuman traffic of the negro slaves, as one of the causes of her quarrel with Great Britain." And in the first clause of the independent constitution of Virginia, "the inhuman use of the royal negative" in this matter is enumerated among the reasons justifying the separation of the colonies from the mother country.<sup>g</sup>

It is then not too much to assert that the institution of slavery, which has now become identified with the social system of the southern American States, was originally es-

<sup>f</sup> Brougham's Colonial Policy, b. ii. § i.

<sup>g</sup> Walsh's Appeal, p. 317.

In 1772, the assembly of Virginia presented a petition to the crown, stating that the importation of slaves into the colony from the coast of Africa, had long been considered as a trade of great inhumanity, and under its *present encouragement* they had too much reason to fear would *endanger the very existence* of his majesty's American dominions; that it greatly retarded their settlement with *more useful inhabitants*; and the assembly presumed to hope that the *interests of a few* would be disregarded when placed in competition with the *security and happiness of such numbers* of his majesty's dutiful and loyal subjects; and beseeching the crown to *remove all those restraints* on the governors of that colony, which inhibited their assenting to such laws as might check *so very pernicious a commerce*. Judge Tucker, in his "Notes to the American edition of Blackstone's Commentaries," from which we borrow this account of the petition, states that he had been lately favoured with the perusal of a letter from Granville Sharp, dated March 25th, 1794, in which he speaks of the petition thus:—"I myself was desired, by a letter from America, to inquire for an answer to this extraordinary Virginia petition. I waited on the secretary of state, and was informed by himself that the petition was received, but that he apprehended *no answer would be given*." Tucker's Blackstone, vol. i. pt. 2; app. x. p. 431.

In the address of the two houses of parliament to the Prince Regent in 1819, (hereafter quoted,) on the subject of the slave trade, it is distinctly avowed that Great Britain "was originally instrumental in leading the Americans into this criminal course." Fourteenth Report of the Directors of the African Association, p. 6.

tablished among them by the selfish policy of the mother country, and was perpetuated by the refusal of the metropolitan government to concur in the measures necessary to prevent the increase of the evil by importation. We may even go further, and affirm, with the able author of the "Appeal from the Judgments of Great Britain respecting the United States," that the institution of slavery would never have existed in the latter, or at least would have been abolished by the efforts of the colonies themselves, if it had not been for the counteracting power of the mother country. The earliest denunciation of the iniquities of the slave trade proceeded from that province founded by William Penn; and the great English apostle of abolition has borne testimony to the fact, that the writings which gave the first impulse to the benevolent efforts of his religious sect in this cause proceeded from the same quarter.<sup>b</sup> Long before Clarkson had succeeded in rousing the English nation from its apathy on this subject,—an apathy which had been confirmed by selfish class-interests, then enlisted in *favour*, as they are now enlisted *against*, the slave trade, Anthony Benezet, and a crowd of other American philanthropists, had anticipated his labours in the same field.<sup>i</sup>

No sooner was the independence of the colonies declared in 1776 than the American congress passed a resolution against the purchase of slaves imported from Africa. The constitutional powers of this body did not, at that period of time, extend to a legal prohibition of the importation into the United States, or of the trade in slaves between Africa and the European West India colonies. But the several state governments of Virginia, Pennsylva-

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<sup>b</sup> See Clarkson's History of the Abolition.

<sup>i</sup> Speaking of the combined opposition to the abolition in England, Clarkson says, "The slave trade appeared, like the fabulous hydra, to have a hundred heads; the merchant, the planter, the mortgagee, the manufacturer, the politician, the legislator, the cabinet minister, lifted up their voices against its annihilation."

nia, and New England, passed laws prohibiting both the foreign slave trade and the importation of slaves under the severest penalties. On the establishment of the present federal constitution, the congress was invested with the power of prohibiting the foreign slave trade *immediately*, and the importation of slaves into all the states of the Union *after the 1st of January, 1808*. The abolition of the African slave trade, so far as American citizens are concerned, was thus made a part of the federal compact, or fundamental law of the Union ; and the powers thus given to congress were exerted in the law of the 22d of March, 1794, which prohibited American citizens from participating in the foreign slave trade under the penalties of fine and imprisonment from that date, and at the same time anticipated the interdiction of the importation of slaves after the time limited in the new federal constitution. In 1807, laws were enacted by the congress, on the recommendation of President Jefferson, giving effect to the latter branch of the constitutional power by the actual prohibition of the importation of slaves into the Union after the 1st of January, 1808. In the same year, 1807, an act of the British parliament was passed which provided that no vessels should clear out on a slaving voyage from any port within the British dominions after the 1st of May, 1807, and that no slave should be landed in the British colonies after the 1st March, 1808. And yet Lord Castlereagh was heard to boast in the house of commons on the 9th of February, 1813, that on the subject of punishing the traffic as a crime, Great Britain "had led the way." The truth is, that the American federal government had interdicted the foreign slave trade thirteen years before Great Britain ; that they had made it "punishable as a crime" seven years before ; and established the period of non-importation into the Union four years sooner than that assigned by Great Britain for her colonies.<sup>k</sup>

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<sup>k</sup> Walsh's Appeal, p. 323.

Denmark abolished, in 1792, both the foreign slave trade and the importation into her colonies,—both prohibitions to take effect in 1804. So that, in fact, America preceded all other nations in abolishing the foreign slave trade ; and all others, except Denmark, in prohibiting the importation, and actually preceded Great Britain in making the traffic a criminal offence.

Nor did the American interdiction remain a dead letter. It has been executed by the penal sanctions provided in the above laws, with the auxiliary aid of a naval force on the American coasts which had been specially provided in the act of 1794. The operations of this force have been since extended to the African and West Indian seas.

On the 20th April, 1818, an additional act was passed increasing the penalties of the former law. And on the 1st March, 1819, a law of congress was passed, punishing the offence of importing African slaves with death.

The general traffic was afterwards declared to be piracy, by the act of congress of the 15th May, 1820.<sup>1</sup> But the piracy thus created by municipal statute must not be confounded with piracy under the law of nations. All that is

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<sup>1</sup> In the Supplement to the Fifteenth Annual Report of the Directors of the African Association, the committee state :—" America alone has practically seconded our efforts with cordiality. But even this power, anxious as the committee believe her to be in her wishes to destroy this enormous evil, in which too many of her subjects still participate, is restrained by certain constitutional considerations from that full coöperation which is necessary to its effectual repression. If, however, the report shall be confirmed, that she has, by a legislative enactment, stamped the slave trade with the brand of piracy, and subjected every citizen of the United States, as well as every foreigner sailing under the American flag, who shall be engaged in carrying it on, to capital punishment, she will have elevated her character to a height to which other nations may look with envy ; and she will have set an example which Great Britain, the committee cannot doubt, will be among the very first to imitate, and which must, sooner or later, become a part of the universal code of the civilized world."—p. 8.

meant is, that the offence is visited with the pains and penalties of piracy.

In point of fact, no considerable *importation* of African slaves into the United States has taken place since it was prohibited in 1808. Public opinion, stigmatizing the traffic as a crime against humanity, and the particular interest of the southern states against augmenting the dangerous black population, which already increases by natural means more rapidly than the white, have combined to stimulate the zeal of the public authorities and of the naval commanders to whom this service has been confided. If their efforts have not been completely successful in effectually suppressing the foreign slave trade, and if some few American vessels and citizens are still employed in transporting slaves from the coast of Africa to Brazil and the Spanish West India colonies, it is owing to the same circumstances which have hitherto baffled the efforts of other governments to prevent such a fraudulent abuse of their flag. The abolition of the slave trade by Great Britain slowly won its way to public favour through innumerable difficulties, both within and without the walls of parliament. We have already seen what powerful interests, political and commercial, were combined to retard, and if possible to defeat, the measure. The abolition bill, carried through the commons by the exertions of Mr. Wilberforce in 1804, was immediately thrown out by the lords, and the next year was again lost in the commons. It was ultimately carried under the auspices of the coalition ministry of Mr. Fox and Lord Grenville, who, though transformed into political enemies on the breaking out of the war with France in 1793, had ever continued the zealous and eloquent advocates of the abolition. This ministry, which might be considered a happy accident in the progress of the cause, did not long survive the death of Mr. Fox, which followed within a few months that of his great rival. His colleague, Lord Grenville, had barely time to hurry the measure through parliament before the cabinet was dissolved; and it is remarked by Clarkson,

that though the bill had now passed both houses, "there was an awful fear lest it should not receive the royal assent before the Grenville ministry was dissolved."

This fear might well seem reasonable, since, as we are told by Lord Brougham, "The court was decidedly against abolition. George III, always regarded the question with abhorrence, as savouring of innovation,—and innovation in a part of his empire connected with his earliest and most rooted prejudices, the colonies! The courtiers took, as is their wont, the colour of their sentiments from him. The peers were of the same opinion."<sup>m</sup>

The measure was, at last, reluctantly sanctioned by the crown; and so long as the mighty struggle between Great Britain and her continental enemies continued, it was sought to be executed, so far as neutral countries were concerned (except Portugal,) by the exercise of the belligerent right of visitation and search. France, Spain, and Holland, were cut off from participating in the slave trade by the mere operation of the war itself. The enlightened British cabinet of 1806 foresaw that if they should be able to carry the measure of abolition, the restoration of peace must be coupled with the restitution of the colonies, or a greater part of the colonies, conquered by Great Britain from her enemies, France, Spain, and Holland. In the abortive negotiation for peace undertaken by Mr. Fox in 1806, an attempt was made to induce France to join with Great Britain in abolishing the slave trade. In the account given by Mr. Fox's ambassador, Lord Lauderdale, in parliament, of the causes of the failure of this negotiation, the latter stated, that on his urging with the French ministers, M. de Champagny and General Clarke, the joint abolition of the slave trade, he was answered, "That England, with her colonies well stocked with negroes, and affording a larger produce, might abolish the trade without inconve-

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<sup>m</sup> Brougham, *Statesmen who flourished in the Reign of George III*, p. 154. Paris ed.



nience ; but that France, with colonies ill stocked, and deficient in produce, could not abolish it without conceding to us the greatest advantages, and sustaining a proportionate loss."<sup>n</sup>

In the year 1808, Spain and Portugal threw themselves into the arms of Great Britain for protection against the aggressive attack of Napoleon, under circumstances apparently favourable to the adhesion of these countries to the measures deemed necessary to give effect to the abolition.

The relations of peace and amity between Great Britain and Spain being restored, the measure could no longer be executed against vessels sailing under the Spanish flag by the ordinary means of the belligerent right of visitation and search ; for the novel distinction of a right to ascertain the character of the suspected vessel, by an examination of her papers and equipments, (which we shall hereafter endeavour to show is a distinction without a difference,) had not yet been invented, or even so much as hinted at in the writings of any British civilian, the decisions of any British judge, or in official documents signed by any British statesman. The abolition could not be lawfully executed against vessels sailing under the Portuguese flag by exercising the belligerent right of search, because Portugal had secured to herself by an ancient treaty, then still subsisting, an exemption from the exercise of the right of search for enemy's property as constantly maintained by Great Britain towards other neutral powers. Reasons of temporary policy prevented the British cabinet of 1808-9 from even remonstrating with the Spanish government of the cortes against its being carried on under their flag. "It would have been *unwise*," said Mr. Canning in the house of commons, "to have taken a high tone with them in the day of their distress ; a strong remonstrance on this subject would have gone with too much authority, and would have ap-

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<sup>n</sup> Cobbett's Parliamentary Debates, 1807, vol. viii.

peared insulting." But with the feeble and dependent power of Portugal that high tone was actually assumed; and an order in council was issued, authorizing British cruizers to bring in for adjudication such Portuguese ships as might be found carrying slaves to places not subject to the crown of Portugal. Still the traffic continued rapidly to increase, under circumstances of increased cruelty, covered as it was by the flags both of Spain and Portugal. On the 19th of February, 1810, two treaties were concluded, one of alliance and the other of commerce, between Great Britain and the Prince Regent of Portugal, at Rio Janeiro, whither his royal highness had fled to seek shelter from the storm of French invasion. By the 10th article of the first named treaty, the Prince Regent stipulated to prohibit his subjects from carrying on the slave trade in any part of Africa *not* belonging to him, and within which limits other European powers had renounced it. Great Britain, at the same time, consented to tolerate the traffic in the African possessions of Portugal, in return for other concessions secured to her in the commercial treaty. One of the most important of these was the consent of Portugal to suppress the stipulations contained in the ancient treaty concluded between the English commonwealth, under the Protector Cromwell, and the Portuguese crown, in 1654, by which the principle of *free ships, free goods*, was recognized by England in favour of the Portuguese flag.<sup>o</sup> For more than a century and a half this stipulation had continued to exempt Portuguese ships from the exercise of the belligerent right of visiting and searching for enemy's property, as asserted by Great Britain; which power thus rid herself of the last remaining treaty, by which she had been bound to respect the principle of *free ships, free goods*, asserted by most of the continental nations.

The recent armed neutrality of 1800 had doubtless, con-

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<sup>o</sup> Schoell, *Histoire Abregée des Traités de Paix*, tom. x. pp. 42-45.

vinced her of the dangers to her maritime ascendancy which lurked under a concession originally made to Portugal as the price of exclusive commercial privileges to British subjects. The treaty of Utrecht, 1713, by which the rule of *free ships, free goods*, had been adopted between Great Britain, France, and Holland, and which had been constantly renewed at every successive peace between these maritime powers, down to the French Revolution, was swept away from the European code of public law by that mighty tempest. On the rupture which took place between Great Britain and Russia, in consequence of the British attack on Copenhagen in 1807, the Russian government published, as we have already seen, on the 20th of October of that year, a declaration, "proclaiming anew the principles of the armed neutrality, that monument of the wisdom of the Empress Catherine," and engaging "*never to depart from that system.*" In answer to this declaration, the British government, on the 18th December, 1807, "proclaimed anew those principles of maritime law, against which was directed the armed neutrality under the auspices of the Empress Catherine;" and also stated that it was "the right, and at the same time the duty, of his Britannic majesty to maintain those principles, which he was determined to maintain, with the aid of divine providence, against every confederacy whatever."<sup>b</sup>

This great controversy respecting the rights of neutral navigation thus remained undecided; and Great Britain not only provided, by the treaties of 1810 with Portugal, against the danger which might lurk in the stipulations of her ancient treaty with the same power, but she secured the incidental means of executing her prohibition of the slave trade without doing direct violence to Portuguese independence.

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<sup>p</sup> Martens, Manuel Diplomatique sur les Droits des Neutres sur Mer, p. 69.

Notwithstanding Great Britain thus continued to exercise the uncontested right of search against all neutral powers, and to exclude the flag of her enemies from the traffic in slaves, by the mere operation of the war itself, the annual reports of the African Institution in London conclusively show, that the traffic, thus totally interdicted to British subjects and American citizens, by the respective laws of both countries; to the enemies of Great Britain by the incidental operation of the laws of war; and partially interdicted to her allies by special conventional arrangements, continued to be carried on with continually augmenting horrors down to the general peace of 1814, not only under the allied and neutral flags of Spain, Portugal, and Sweden, but in British vessels, fitted out in the ports of London and Liverpool under the neutral flag and papers, but navigating on account of British slave traders.<sup>q</sup>

The prohibition of the slave trade by the treaty of 1810, between Great Britain and Portugal was of very little importance, as the Portuguese possessions in Africa, south of the equator, exempted from the operation of the treaty, were precisely the markets to which the slave dealers principally resorted for a supply of the wretched victims of their detestable traffic. Sweden was the next power to co-operate in the cause of abolition. The island of Guadeloupe, conquered from France, was ceded to the Swedish crown, upon condition that the importation of slaves into that colony and the other possessions of Sweden should be prohibited. By the peace of Kiel, concluded on the 14th of January, 1814, Denmark, which had prohibited the importation into her colonies long before Great Britain had adopted a similar measure, was made to stipulate the total prohibition of the traffic to her subjects.<sup>r</sup>

Louis XVIII, who had declared that he owed his restoration to the French throne (under divine providence) to

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<sup>q</sup> Reports of 1810, 1811, 1812, and 1813.

<sup>r</sup> Schoell, *Histoire des Traités de Paix*, tom. xi. pp. 177-178.

the Prince Regent of Great Britain, was soon called upon to testify his gratitude by interdicting the slave trade to his subjects, who had been excluded from it by the operation of the war. He consented to prohibit the importation into the French colonies by foreigners *immediately*,—but insisted on tolerating it for five years longer, in respect to his own subjects, in order to enable the French planters to compete with the British islands, which were already fully stocked.\* The British government endeavoured to tempt France to concede the immediate abolition by the offer of a sum of money, or the cession of a West India island, but without success.†

The Dutch government, by a decree of the 15th June, 1815, prohibited the slave trade to its subjects, but this prohibition was not then specifically applied to the former Dutch colonies, since they still remained in the possession of Great Britain by right of conquest. By the convention of the 13th August, 1815, the Dutch government purchased the restitution of their colonies, excepting the Cape of Good Hope and Dutch Guiana, by the entire prohibition of the slave trade, including the importation into the restored colonies.‡

Lord Wellington, being re-appointed British ambassador at Paris in 1815, was instructed to propose to Louis XVIII (a second time restored to the throne of his ancestors by

\* Schoell, tom. xi. p. 178. In defending the stipulation in the treaty of Paris, signed the 30th May, 1814, (first additional article,) relating to the French slave trade, against the attacks of the opposition, Lord Castlereagh stated to the house of commons, that, "However he and the British nation might be inclined to make sacrifices for the abolition, he could assure the house that such was not the impression in *France*, and that even among the better classes of people there, *the British government did not get full credit for their motives of acting*. The motives were not there thought to arise from benevolence, but from a wish to impose fetters on the French colonies and injure their commerce."

† Ninth Report of the Directors of the African Institution, pp. 15–16.

‡ Schoell, tom. x. p. 536; xi. p. 179.

the efforts of Great Britain and her allies) the prohibition of the importation of all colonial produce raised in the territories of those countries which had not yet abolished the slave trade. The proposition was rejected by the French government, and the whole subject referred to the congress of Vienna.<sup>v</sup>

During the negotiation of the treaty concluded at Madrid, on the 5th July, 1814, between Great Britain and Spain, the British minister, Sir Henry Wellesley (now Lord Cowley,) endeavoured to cause an article to be inserted, by which Spain should prohibit to her subjects both the general slave trade and the importation into the Spanish colonies. But the British negotiator was only able to obtain from the Spanish government the interdiction to its subjects of the foreign slave trade to other than the Spanish possessions, the Duke of San Carlos remarking, that when the trade was abolished by Great Britain, the proportion of negroes to whites in the British colonies was as twenty to one in number; that, on the contrary, in the Spanish colonies, there were not more negroes than whites; that Great Britain had taken twenty years to accomplish the abolition, from the first incipient stage of its being carried in the house of commons in 1794: from which the Spanish minister inferred, that it was unreasonable to require of Spain the sudden adoption of a measure which would be fatal to the very existence of her colonies. After the signature of the treaty, Lord Cowley endeavoured to tempt the Spanish government to concede a point so important to Great Britain, by offering to continue the pecuniary subsidies which the deplorable condition of the Spanish finances might seem

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<sup>v</sup> Schoell, tom. xi. p. 181. The first additional article to the treaty of Paris, 30th May, 1814, had already provided that France and Great Britain should "unite their efforts at the congress, in order to declare by all the powers of Christendom the abolition of the negro slave trade as repugnant to the principles of natural justice and the enlightened age in which we live." Martens, *Nouveau Recueil*, tom. vi. p. 11.

to render indispensable. It appears from his despatches that this final effort of the able British negotiator proved fruitless.<sup>w</sup>

Lord Castlereagh was more successful in the negotiations he undertook with Portugal, and which resulted in the signature of two conventions with that power, signed at Vienna on the 21st and 22d of January, 1815. By this arrangement, Great Britain obtained from the Portuguese government, for pecuniary equivalents, the prohibition to its subjects of the slave trade on the western coast of Africa north of the equator.<sup>x</sup>

We now come, in the course of our rapid historical deduction, to the memorable epoch of the congress of Vienna. The circumstances are notorious which diverted the attention of this great Amphictyonic council of nations from the re-adjustment of the maritime and colonial balance of power, and from the renewal of those stipulations in favour of the maritime rights of neutrals which had continued to form a part of the public law of Europe from the peace of Utrecht to the French Revolution. During the abortive negotiation for peace with the French republic at Lisle in 1796, the British negotiator, Lord Malmsbury, proposed to renew, in the projected treaty, the stipulation which had been repeated at every successive peace concluded between France and Great Britain since the the treaties of Utrecht, 1713, confirming the various articles of those treaties. The British negotiator stated that great confusion would ensue from the non-renewal of this stipulation. The French directory, however, rejected the proposal, doubtless from an apprehension that such an engagement might prove inconsistent with the new territorial arrangements which the acknowledgment of the French republic, and its brood of sister republics, would necessarily draw after it. Had either party

<sup>w</sup> Schoell, "*Recueil des Pièces Officielles*," tom. vii. pp. 140, 143, 171.

<sup>x</sup> Martens, "*Recueil des Traités*," tom. xiii. p. 93.

expected, or sincerely desired peace to be the result of this negotiation, they would probably have more deeply considered the matter. Great Britain might have weighed the light value of such a stipulation in restraining the ambition of France, whilst France might have considered the renewed acknowledgment of the principle of *free ships, free goods*, by the British government, as of much more importance to the maritime interests of France than the mere possible inferences respecting the continental balance of power which might be drawn from the renewal of the treaties of Utrecht. Be this as it may, it could not be expected that the monarchs assembled at Vienna, owing so deep a debt of gratitude to the British government for its strenuous resistance to "the enemy of Europe," and disturbed as they were in the midst of their deliberations by the reappearance of their common foe on the scene of action, could think of providing against the possible abuse of the immense maritime resources and naval power which the results of the war had left in the hands of Great Britain, and which she had taken care to secure by separate treaties of peace with the maritime states, her late enemies. Nor could it be expected that the allied sovereigns would deny to Great Britain almost any concession in favour of her colonial interests, which did not directly affect in an injurious manner the commercial interests of those continental states who possessed no colonies. This was more especially to be looked for when such concessions should be demanded in the name of humanity and of the sacred cause which had so long and deeply engaged the affections of philanthropists throughout the Christian world. The only wonder is, after all, that some more decisive measure was not obtained by Lord Castlereagh from the congress than the declaration of the 15th February, 1815, denouncing the African slave trade "as inconsistent with the principles of humanity and universal morality," and, at the same time, leaving every state at liberty to determine for itself, or by negotiation with others, the period when the odious traffic



should be finally abolished. Even this qualified denunciation of the traffic encountered serious opposition from the ministers of Spain and Portugal, who absolutely refused to listen to the renewal of the same proposition which had been before made at Paris, that in case the trade should be still continued by any state beyond the term justified by real necessity, the dissent of such state should be punished by the prohibition of the importation, into the dominions of all the powers represented in the congress, of colonial produce, the growth of any colony where the trade should still continue to be tolerated ; and that they should only permit the introduction of the products of such colonies where the trade was unlawful ; " or," as the protocol stated, " those of the vast regions of the globe which furnish the same productions by the labour of their own inhabitants."†

The ministers of Spain and Portugal declared that the introduction of such a system would give rise to reprisals on the part of any state to which it might be applied ; and they urged in favour of the further continuance of the traffic in human flesh by their countrymen, that the British colonies were fully stocked with slaves during the long interval which elapsed from the first authentic proposal until the final adoption of the measure of abolition by Great Britain ; whilst the colonies of Cuba and Porto Rico had been cut off, during all that period, by the war, from recruiting their slave population ; and the vast regions of Brazil still required an annual supply from the African coast to keep up its cultivation.

The result was that Lord Castlereagh completely failed in his endeavours to obtain the *immediate* abolition, or to

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† Schoell, *Histoire des Traités de Paix*, tom. x. pp. 187-188. " These vast regions," says Schoell, " refer to the British possessions in the East Indies, the interest of which, though their express mention was studiously avoided in the negotiation, was found to conform to the principles of humanity and religion. Europe will one day become tributary to these countries, when the plantations of the West Indies shall be deserted for want of hands to cultivate them."

shorten the period for which the trade should be carried on by France, Spain and Portugal. France still insisted on continuing it for five years, nor could the Spanish and Portuguese governments be prevailed upon to fix a shorter period than eight years.<sup>a</sup>

What the British government could not persuade the Bourbons to do, the Emperor Napoleon spontaneously did, on his return from Elba, by his decree, March 1814, immediately abolishing the slave trade in France and her colonies.<sup>a</sup> This decree, wedged in between the first and second restorations, must evidently be considered as a desperate attempt to conciliate England at that critical period of his fortunes ; since, in the zenith of his power, he had, as we have already seen, absolutely refused the concession as fatally injurious to the colonial interests of France.<sup>b</sup> Louis XVIII, on his return from Ghent, could do no less than confirm the imperial measure, by a formal assurance that "the trade was henceforth for ever forbidden to all the subjects of his most Christian majesty," under the hand of that same Prince Talleyrand, who once said that "language was given to man to conceal his thoughts." Whether the Bourbon kings of the elder branch had conceived in-

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<sup>a</sup> Ninth Report of the Directors of the African Institution, pp. 18-19. Klüber, *Acten des Wiener Congresses*, bd. iv. s. 531.

<sup>a</sup> Ninth Report of the Directors of the African Institution, Appendix C. p. 83.

<sup>b</sup> In their Tenth Report, 27th of March, 1816, the Directors of the African Institution state that "the gratification they felt in being able to lay before the subscribers the memorable denunciation of the slave trade by the powers assembled in congress at Vienna, was greatly damped by the consideration that all these measures, however wisely planned or unceasingly urged, had proved ineffectual ; and that the French government had determined to retain their slave trade for the full term allowed by the treaty of Paris. Very soon, however, after the declaration of the congress, there arose a cloud in the political horizon, which seemed to threaten desolation to the civilized world. Yet, amidst this gloom, a beam of light unexpectedly shone upon Africa. No sooner had Bonaparte regained for a season the government of France, than he issued a decree for the immediate and total abolition of the French slave trade."

veterate prejudices against the abolition, as a dream of revolutionary philosophy which had been fearfully realized in the bloody catastrophe of the flourishing colony of St. Domingo, or whether they consulted merely the feelings and supposed commercial interests of their subjects, it would be superfluous to inquire. It is, however, certain that the pretended abolition remained for a long time unexecuted under the government of the restoration.<sup>c</sup>

It was during the negotiations undertaken by the British government with the French cabinet, after the peace of 1814, that we first hear of the proposition to concede the mutual right of search as the only effectual means of suppressing the trade. The Duke of Wellington proposed it to Prince Talleyrand, but soon discovered "that it was too disagreeable to the French government and nation to admit of a hope of its being urged with success."<sup>d</sup>

By the treaty of Madrid of the 22d of September, 1817, Great Britain purchased from Spain the immediate abolition of the trade north of the equator, and a promise to abolish it entirely after the year 1820, for the sum of 400,000*l*.

<sup>c</sup> Eleventh Report of the Directors of the African Institution, pp. 1-10. Memoranda relating to the slave trade in France in 1820.

<sup>d</sup> Duke of Wellington's despatch to Lord Castlereagh, 5th November, 1814.

Mr. Berryer, in his speech in the chamber of deputies, January 24, stated that "the Duke of Wellington communicated on the 26th of August, 1814, to the king's ministry a memoir tending to establish the principle of the abolition of the negro slave trade; and, as a means of effecting this object, he demanded, among other things, that there should be granted to the ships of war of both nations, north of the equator, and to the twenty-fifth degree of west longitude from the meridian of Greenwich, the permission to visit the merchant vessels of both nations, and to carry into port such, on board of which slaves should be found, there to be confiscated according to the laws of the state to which they might belong."

M. de Talleyrand answered, in the name of the King of France, that he would never admit any other maritime police than that which each power exercised on board its own vessels. (*Journal des Débats*, January 25, 1842.)

Mr. Wilberforce stated during the discussion of the treaty in the house of commons on the 9th of February, 1818, the great advantages of this bargain: "He could not but think that the grant to Spain would be more than repaid to Great Britain in commercial advantages by the opening of a great continent to British industry,—an object which would be entirely defeated if the slave trade was to be carried on by the Spanish nation. Our commercial connexion with Africa will much more than repay us for any pecuniary sacrifices of this kind. He himself would live to see Great Britain deriving the greatest advantages from its intercourse with Africa."

The treaty of Madrid also contained the so much desired concession of the right of search, which had, in the meantime, been yielded by Portugal, as to the trade interdicted by her north of the equator. During the same debate above referred to great satisfaction was expressed with this arrangement. "The introduction of the right of search, and of bringing in for condemnation in time of peace, was declared to be a *precedent* of the utmost importance."

Lord Castlereagh determined to avail himself of this "precedent" without delay. He assembled the ministers of the principal maritime powers of Europe in London in the month of February, 1818, and laid before them a paper, stating, that since the peace a considerable revival of the slave trade had taken place, especially north of the equinoctial line, and that the traffic was principally of the illicit description. That as early as July, 1816, a circular intimation had been given to all British cruisers, *that the right of search, being a belligerent right, had ceased with the war*. That it was proved beyond the possibility of doubt, that unless the right to visit vessels engaged in the slave trade should be established by mutual concessions on the

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• Walsh's Appeal, p. 376.

part of the maritime states, the illicit traffic, must not only continue to exist, but must increase. That even if the traffic were universally abolished, and a single state were to refuse to submit its flag to the visitation of the vessels of other states, nothing effectual would have been done. That the plenipotentiaries ought, therefore, to enter into an engagement to concede mutually the right of search, *ad hoc* to their ships of war.

The ministers of the different maritime powers of the European continent assembled in the conference, could not, of course, do more than engage to transmit this proposition to their respective courts.<sup>f</sup>

On the 21st of February, 1818, Lord Castlereagh addressed Sir Charles Stuart, the British ambassador at Paris, a despatch, accompanied with a memorandum laid before the conference of London, with instructions to endeavour to obtain the assent of the French government to concur in adopting, with a view to the more effectual suppression of the slave trade, the mutual right of search which had been conceded by Spain, Portugal, and the Netherlands. But the proposition was rejected by the Duke of Richelieu, on the ground that "the offer of reciprocity would prove illusory; and that disputes must inevitably arise from the abuse of the right, which would prove more prejudicial to the interests of the two governments than the commerce they desired to suppress."<sup>g</sup>

The American minister was, of course, not invited to the above conference. The United States have hitherto, wisely as they believe, avoided as far as possible entangling themselves in the complicated international relations of Europe and the inextricable labyrinth of European politics. Instead of appearing in the great Amphictyonic councils of

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<sup>f</sup> Thirteenth Report of the Directors of the African Institution, pp. 3-11.

<sup>g</sup> Supplement to the Fifteenth Annual Report of the Directors of the African Institution, p. 77.

European nations, where they might be outvoted by a preponderance of interests and views having no connection with their policy, they have, in general, abstained from mixing up their concerns with those of the Old World. This policy, of course, may admit of exceptions, which will probably hereafter be multiplied as the facilities of intercourse between the two continents of Europe and America are increased, and their respective commercial and political interests become more blended together. But the subject now under consideration was not deemed by the American cabinet of 1818, over which then presided that most prudent of statesmen, Mr. Monroe, to constitute an exception to those general rules which had been laid down by Washington, and ever since undeviatingly pursued by the illustrious men his successors, without distinction of domestic party.

Such being the known disposition of the United States' government, the proposal in question was communicated by Lord Castlereagh to Mr. Rush, the American minister in London, together with the treaties then recently concluded by Great Britain with Spain, and other European powers, conceding the right of search under certain regulations, and inviting the American government to join in the same, or like arrangements. Mr. Rush took the communication *ad referendum* to his government.

In the reply of Mr. Secretary Adams to Mr. Rush's despatch on this occasion, the latter was directed by the President to give the strongest assurances to the British government that the solicitude of the United States for the accomplishment of the common object—the total and final abolition of the slave trade—continued with all the earnestness that had ever distinguished the course of their policy in respect to that odious traffic. As a proof of this continued earnestness, Mr. Rush was desired to communicate to that government a copy of the act of congress then just passed (act of the 20th of April, 1818,) in addition to the prohibitory law of 1807; and to declare the readiness of

the American government to adopt any further measures within their constitutional power, which experience might prove to be necessary for the purpose of attaining so desirable an end.

But on examining the treaties communicated by Lord Castlereagh, it would be observed that all their essential provisions appeared to be of a character not capable of being adapted to the institutions or the circumstances of the United States.

The power agreed to be reciprocally given to officers of the ships of war of either party to enter, search, capture, and carry into port for adjudication the merchant vessels of the other, however qualified and restricted, is most essentially connected with the establishment by each treaty, of two mixed courts, one of which to reside in the external or colonial possessions of each of the two parties, respectively. This part of the system was indispensable, to give it that character of reciprocity without which the right granted to the armed ships of one nation to search the merchant vessels of another would be rather a mark of vassalage than of independence. But to this part of the system the United States, having no colonies, either on the coast of Africa or in the West Indies, could not give effect.

Mr. Rush was instructed to add that, by the American constitution, it was provided that the judicial power of the United States should be vested in a supreme court, and in such inferior courts as the congress might, from time to time, ordain and establish. It provided that the judges of these courts should hold their offices during good behaviour, and that they should be removable by impeachment and conviction of crime or misdemeanour. There might be some doubt whether the constitutional power of the federal government was competent to institute a court for carrying into execution their penal statutes beyond the territories of the United States,—a court consisting partly of foreign judges not amenable to impeachment for corruption,

and deciding upon the statutes of the United States without appeal.

It was further stated, that the disposal of the negroes found on board the slave trading vessels, which might be condemned by these mixed courts, could not be carried into effect by the United States ; for, if the slaves of a vessel condemned by the mixed courts should be delivered over to the United States' government as free men, they could not, but by their own consent, be employed as servants or free labourers. The condition of the blacks in the American Union being regulated by the municipal laws of the separate states, the United States' government could neither guaranty their liberty in the states where they could only be received as slaves, nor control them in the states where they would be recognized as free.

That the admission of a right in the officers of foreign ships of war to enter and search the vessels of the United States, in time of peace, under any circumstances whatever, would meet with the universal repugnance in the public opinion of that country. That there would be no prospect of a ratification, by the advice and consent of the senate, to any stipulation of that nature. That the search by foreign officers, even in time of war, was so obnoxious to the feelings and recollections of the country, that nothing could reconcile them to the extension of it, to a time of peace, however qualified or restricted. And that it would be viewed in a still more aggravated light, if, as in the treaty with the Netherlands, connected with a formal admission that even vessels under convoy of ships of war of their own nation should be liable to search by the ships of war of another.

Mr. Rush was therefore, finally, instructed to express the regret of the President, that the stipulations in the treaties communicated by Lord Castlereagh were of a character to which the peculiar situation and institutions of the United States did not permit them to accede. The constitutional objection might be the more readily understood by



the British cabinet, if they were reminded that it was an obstacle proceeding from the same principle which prevented Great Britain, formally, from being a party to the holy alliance ; neither could they be at a loss to perceive the embarrassment under which the American government would be placed by receiving cargoes of African negroes under the obligation of guarantying their liberty and employing them as servants. Whether the British cabinet would be as ready to enter into the feelings of the American government with regard to the search by foreign navy lieutenants of vessels under convoy of American naval commanders, was, perhaps, of no material importance. The other reasons were presumed to be amply sufficient to convince them that the motives for declining this overture were compatible with an earnest wish that the measures concerted by these treaties may prove successful in extirpating that root of numberless evils, the traffic in human blood ; and that they were also compatible with the determination of the American government to coöperate, to the utmost extent of its constitutional powers, in this great vindication of the sacred rights of humanity.<sup>a</sup>

It will thus be perceived that the proposition made by Lord Castlereagh to the American government to concede the right of search as the only effectual means of attaining the common end both governments equally desired to attain, was courteously, but peremptorily, rejected by the American cabinet. The pretension of exercising that right upon American vessels, in any form, however mitigated, and under any name, however adapted to conceal its real character, without the express consent of the United States, was not then even so much as hinted at by a British statesman, not wanting in bold daring on occasions suitable to the display of that quality. But Lord Castlereagh, with

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<sup>a</sup> Mr. John Quincy Adams' Despatch to Mr. Rush, November 2, 1818. American State Papers, (foreign relations,) vol. iv. p. 399.

all his political courage, was a man of too much sagacity not to perceive that the deep wounds inflicted by the abuse of the right of search, which had produced the war between the two countries, then so recently terminated, were still too fresh to allow the American government, even if it had been so disposed, to allow of its revival in any shape and for any purpose, even by compact, much less to submit to its gratuitous assumption in time of peace. When the Spanish treaty was laid before parliament, his lordship stated that "the illicit traffic arose out of the partial abolition, and out of the facilities created by the cessation of belligerent rights in consequence of the peace. It was for the first time, he believed, in diplomatic history that the states of Europe had bound themselves by a mutual stipulation to exercise the right of search over their respective merchantmen with a view of giving effect to this laudable object. They had now arrived (said he) at the last stage of their difficulties and the last stage of their exertions. One great portion of the world was rescued from the horrors of the traffic. The approval of the grant amounted to this, whether the slave trade should be entirely abolished or not ?"<sup>i</sup>

On the 4th May, 1818, a treaty was concluded between Great Britain and the Netherlands, by which the mutual right of search for the suppression of the slave trade was conceded to the cruisers of each party all over the world, except in the European seas, and mixed commissions were established with authority to adjudicate upon the vessels detained.

Fortified with these concessions from Spain and the Netherlands, Lord Castlereagh repaired to the congress of Aix la Chapelle, whither he was followed by Mr. Clarkson, the great apostle of abolition. The latter presented in November, 1818, an eloquent memorial to the assembled so-

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<sup>i</sup> British Annual Register, vol. lx. p. 19.

vereigns, which was supported by the former with the whole weight of the power and influence of Great Britain. This paper stated that, "in point of fact, little or no progress had been made in practically abolishing the slave trade. That all the declarations and engagements of the European powers as to abolition, must prove perfectly unavailing, unless new means were adopted." The British minister, therefore, proposed, as the only means left of accomplishing the object avowed by the congress of Vienna, 1st, The general concession of a reciprocal right of search and detention for trial, applicable to the merchant vessels of all nations who had prohibited the trade; 2d, The solemn proscription of the trade as piracy under the law of nations.

These proposals were answered by the plenipotentiaries of the five great European powers in separate notes. France peremptorily rejected both proposals, and suggested, as a counter *projet*, a plan of common police for the *surveillance* of the trade, by which the several powers would be immediately informed of the transactions of each other with respect to it, and of all abuses practised within the limits of their respective jurisdictions.

The proposal to declare the trade piracy under the law of nations was also rejected by the three great powers, Austria, Prussia, and Russia. "It was evident," said the latter, "that the general promulgation of such a law could not take place until Portugal had totally renounced the trade."

The above three powers also concurred with France in rejecting the British proposal as to the right of visitation and search. The answer of the Russian plenipotentiary, Count Nesselrode, stated that it appeared to the Russian cabinet, beyond all doubt, that there were some states whom no consideration would induce to submit their navigation to a principle of such great importance as the right of visitation and search (*droit de visite*.) He, therefore, proposed, in lieu of the British *projet*, the establishment of "an in-

stitution, situated at a central point on the western coast of Africa, in the formation of which all the states of Christendom should take a part. This institution being declared for ever neutral, separated from all political and local interests, like the fraternal and Christian alliance, of which it would be a practical manifestation, would pursue the single object of strictly maintaining the execution of the laws.

The institution would consist of a maritime force, composed of an adequate number of ships of war appropriated to the service ; of a judicial power, which should adjudicate on all criminal offences relating to the trade, according to a code of legislation on the subject established by the common wisdom ; of a supreme council, in which would reside the authority of the institution, which would regulate the operations of the maritime force, would revise the sentences of the federal tribunals, would cause them to be executed, would inspect all details, and would render an account of its administration to future European conferences. The right of visiting and detaining for trial would be granted to this institution, as the means of fulfilling the end of its establishment ; and, perhaps, no maritime nation would refuse to submit its flag to the jurisdiction of this police, exercised in a limited and clearly defined manner, and by a power too feeble to be abused, too disinterested on all maritime and commercial questions, and, above all, too widely combined in its elements not to observe a severe but impartial justice towards all."<sup>k</sup>

It may easily be anticipated by the reader that neither the French nor the Russian substitute for the British *projet* was acceptable to Lord Castlereagh. He proposed a counter *projet* limiting the exercise of the right of search demanded to a term of years. "He flatters himself," says the thirteenth Report of the African Institution, "that he

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<sup>k</sup> Thirteenth Report of the Directors of the African Institution, pp. 23-25.

has made a considerable impression in removing the strong repugnance which was at first felt to the measure."<sup>1</sup>

All that could be obtained from the congress of Aix la Chapelle was a declaration that "the negro slave trade was an odious crime, the disgrace of civilized nations, and that it was a matter of urgency to put an end for ever to this scourge which had so long desolated Africa, degraded Europe, and afflicted humanity."<sup>2</sup>

The next we hear of this attempt to incorporate into the maritime code of nations "a principle of such great importance," as it was termed in the above note of the Russian plenipotentiary at Aix la Chapelle, was at the congress of Verona. In the despatch addressed on the 1st October, 1822, by Mr. Canning (who had become secretary of state for foreign affairs in the place of the Marquis of Londonderry,) to the Duke of Wellington, British ambassador at the congress, it was stated that whatever might be the advantage or disadvantage to the British colonies, it was much to be feared that, to Africa, the abolition by Great Britain had been an injury rather than a gain. The slave trade, so far from being diminished in extent by the exact amount of what was in former times the British demand, was, upon the whole, perhaps, greater than at the period when that demand was the highest; and the aggregate of human sufferings, and the waste of human life in the transportation of slaves from the coast of Africa to the colonies, were increased in a ratio enormously greater than the increase of positive numbers. Unhappily, it could not be denied that their very attempts at prevention, imperfect as they yet were, under the treaties which then authorized their interference, tended to the augmentation of the evil. The dread of detection suggested expedients of concealment productive of the most dreadful sufferings to a cargo, with

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<sup>1</sup> Report, pp. 1-3.

<sup>2</sup> Fourteenth Report of the Directors of the African Institution, p. 1.

respect to which it hardly ever seems to occur to its remorseless owners that it consists of sentient beings. The numbers put on board in each venture were so far from being proportioned to the proper capacity of the vessel, that the probable profits of each voyage were notoriously calculated only on the survivors; and the mortality was accordingly frightful, to a degree unknown, since the attention of mankind had been first called to the horrors of this traffic.

Mr. Secretary Canning added, that to these enormous and, he feared, even growing evils, they had nothing to oppose but the declaration of the congress of Vienna; their treaties with Spain and the Netherlands, abolishing the trade definitively and totally, and that with Portugal restricting the Portuguese slave trade to the south of the line. It was the truth (however lamentable or incredible) that, by the testimony of the French government itself, there was no public feeling on this subject in France which responded in the smallest degree, to the sentiment prevalent in England; that no credit was given to the people or the legislature of that country for sincerity in those sentiments; that their anxiety on the matter was attributed to a calculation of national interest; and that a new law, founded on a proposition from England for new restrictions on the illicit slave trade, would at this moment be thrown out in the legislature of France.

The principal advantage, then, to be derived from the union of sovereigns at Verona, according to Mr. Secretary Canning, appeared to resolve themselves into the following:—

1. An engagement on the part of the continental sovereigns to mark their abhorrence of this accursed traffic, by refusing admission into their dominions of the produce of colonies belonging to the powers who had not abolished, or who notoriously continued, the slave trade.

2. A declaration in the names, if possible, of the whole alliance; but, if France shall decline being a party to it,

then in the names of the three other powers, (Austria, Prussia, and Russia,) renewing the denunciation of the congress of Vienna, and exhorting the maritime powers who had abolished the slave trade to concert measures among themselves for proclaiming and treating it as piracy, with a view of founding upon the aggregate of such separate engagements between state and state a general engagement to be incorporated into the public law of the civilized world.

Such a declaration, it was added, as it assumed no binding force, would not be obnoxious to the charges which would attach to the introduction of a new public law by an incompetent authority ; while, at the same time, its moral influence might materially aid the British cabinet in its negotiations with other maritime states. It could have no difficulty in consenting that subjects of the United Kingdom found trading in slaves should be treated as pirates, upon a reciprocal admission of the same principle by other powers.

All the powers assembled in the congress united in declaring their continual adherence to the principles in favour of which they had pronounced themselves since the congress of Vienna ; and it was agreed to record anew these principles by a declaration analogous to that of the 8th February, 1815. But the particular practical measures proposed by the British plenipotentiary to give effect to this renewed profession of principles, were taken *ad referendum* by the other plenipotentiaries, except those of France, for the further deliberations of their respective courts.

The plenipotentiaries of France, MM. de Chateaubriand and de Caraman, explicitly rejected these measures in a detailed answer to the Duke of Wellington's memorandum, in which, after avowing that "the French government participated in the solicitude of the British government to suppress a traffic equally reprehensible in the eyes both of God and man," they proceeded to develop the causes which rendered public opinion less decided on this subject in

France than in Great Britain. A people so humane, so generous, and so disinterested as that of France—a people always ready to furnish the example of submitting to sacrifices—deserved to have explained what might appear an inexplicable anomaly in their character.

The massacre of the colonists of St. Domingo, and the burning of their habitations, left, in the first instance, painful recollections among those families who lost relations in those sanguinary revolutions. It might be permitted to call to mind these calamities of the *whites*, when the British memorandum painted with so much truth and force of colouring, the sufferings of the *blacks*, in order to prove that every thing which excites pity naturally influences public opinion. It was evident that the abolition of the slave trade would have been less popular in England, if it had been preceded by the ruin and murder of the British colonists in the West Indies.

It might further be remarked that the abolition of this traffic was not decreed in France by an act of national legislation discussed in the tribune. It was the result of a stipulation in the treaty by which France had atoned for her victories. From that moment the measure was coupled in the eye of the multitude with foreign considerations, merely because they believed it to be imposed upon them; and it, therefore, became subjected to that unpopularity which must ever attend measures of compulsion. The same thing would have happened in any country where public spirit and a proper degree of national pride are found to exist.

A motion in the British parliament, ever honourable to its philanthropic author, was finally crowned with success; but this triumph was achieved after repeated rejections of the proposed measure, although supported by one of the greatest ministers England ever produced. During these protracted debates, public opinion had time to ripen and to come to an ultimate decision. The commercial interest, which foresaw the result, had time to take its precautions :



a number of negroes, exceeding the wants of the colonies, were transported to the British islands ; and successive generations of slaves were thus provided to fill up the void to be occasioned by the abolition of the traffic when it should take place.

No such advantage was possessed by France. The first convention on this subject between France and Great Britain after the restoration, recognized the necessity of acting with prudent caution in a matter of a nature so complex. An additional article to the convention allowed a delay of five years for the entire abolition of the traffic.

It was further stated in this paper, that the French government was determined to pursue without relaxation the prosecution of the parties engaged in this barbarous traffic. Numerous condemnations had already taken place, and the tribunals had severely punished wherever the guilt of the accused was ascertained. The British memorandum stated that "it would be dreadful that the necessity of destroying human beings had become the consequence of that of concealing a traffic proscribed by the laws." This too just remark proved that the French law had been rigorously executed ; and the cruel precautions taken by the violators of the treaty in order to secrete their victims proved, in a striking manner, the vigilance of the government.

In respect to one of the particular measures proposed by Great Britain, that of the introduction of a new public law declaring the offence of being engaged in the slave trade to be piracy under the law of nations, the French plenipotentiaries declared, that "a deliberation tending to oblige all governments to apply to the slave trade the punishment inflicted on the crime of piracy, could not, in their opinion, be within the province of a diplomatic conference."

In reply to this suggestion, the Duke of Wellington stated, in verbal conference, that his proposition had no other view than to engage all the maritime powers who had abolished the slave trade to concert among themselves the

measures to be adopted in order to declare this traffic piracy, and to punish it accordingly.

M. de Chateaubriand rejoined, that the French plenipotentiaries had perfectly understood that the British memorandum required each government, separately, to pass a law assimilating the slave trade to piracy; but that they could not sign a declaration in which this desire should be expressed, because they could not undertake to prescribe to their government the title, form, tenor, or extent of any laws.

The discussions at the congress of Verona, thus resulted, in a mere repetition of the barren denunciations of the congress of Vienna and that of Aix la Chapelle. The three northern powers of the continent would not listen to the British proposition to grant a monopoly in their markets of the colonial products of such countries as had prohibited the slave trade, nor to introduce a new public law of Europe by which the offence of engaging in the trade should be considered as piracy under the law of nations. France peremptorily refused to take any new measures to suppress the traffic.

Such is the account given of these transactions in the papers presented to the British parliament. But we are told by M. de Chateaubriand, in his "History of the Congress of Verona," that in the memoir presented by the Duke of Wellington under date of the 24th November, 1822, the British cabinet expressed its regret that France should be the only one of the great maritime powers<sup>a</sup> which still refused to accede to the arrangements concluded between Great Britain and other states, with the view of conferring upon certain ships of war of the contracting parties the limited right of search and confiscation against merchant vessels engaged in the slave trade. M. de Chateaubriand

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<sup>a</sup> It seems that Spain and Portugal were "great maritime powers," whilst Russia and the United States were not.

answered this intimation by stating that the French government could never consent to acknowledge the right of search. The national character, both of the French and English people, was opposed to its exercise, which, as between them, would be attended with the most fatal consequences; and if proofs were wanting in support of this opinion, they would be found in the fact that during that very year French blood had flowed on the coast of Africa. France recognised the freedom of the seas for all foreign flags to whatever lawful power they might belong: she only contended for that independence, in respect to herself, which she respected in others, and which was consistent with her national dignity.\*

Great Britain could hardly expect to obtain from the congress of Verona, at that period, this so much coveted boon, nor any of the other concessions demanded in respect to a matter in which, though the interests of humanity were deeply concerned, the continental powers perceived, that her colonial and commercial interests were also involved in the prosecution of the same cause. We say that Great Britain could hardly expect to obtain these concessions from the European congress at that period, because she was strenuously opposed to the main object for which it had been assembled; that is to say, in order to countenance the armed interference of France in the internal affairs of Spain. The British cabinet had been gradually detaching itself, ever since the congress of Troppau and that of Laybach, from the alliance between the great continental powers, so far as that alliance was founded upon the claim of a general right to interfere in the internal transactions of other states, in order to prevent revolutionary changes in their forms of government or reigning dynasties.<sup>p</sup> This

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\* *Histoire du Congrès de Verone*, tom. i.

<sup>p</sup> See Lord Castlereagh's Circular Despatch of the 19th of January, 1821. (*British Annual Register*, vol. lxii. pt. ii. p. 737.)

gradual separation from the continental powers, on a point of policy so vitally important to them, begun by Lord Castlereagh (afterwards Marquis of Londonderry,) under the administration of the Earl of Liverpool, was continued and completed under that of Mr. Canning. Great Britain did not oppose by force, as the latter minister declared she might have done, the armed interference of France in the internal affairs of Spain; in consequence of which the constitution of the cortes was overthrown, Ferdinand VII restored to the plenitude of his royal authority, and British influence destroyed for a time in that part of the Peninsula. But she acknowledged the independence of the Spanish colonies on the American continent; and, as Mr. Canning afterwards said, "called into existence a new world in order to redress the balance of the old."<sup>1</sup> This decisive measure, followed by the armed interference of Great Britain in the internal affairs of Portugal in 1826, disturbed the intimacy of her relations with the great powers of the continent, and rendered them still less disposed to yield any point of peculiar interest to her without adequate equivalents. This unaccommodating disposition continued, as we shall hereafter see, until the French Revolution of 1830, by separating for a time France under her new dynasty of the house of Orleans, from the general European alliance, enabled Great Britain to obtain from that power the concession of the right of search, which was yielded to the influence of those philanthropic sentiments and unsuspecting confidence in British friendship which marked that era. The treaty of the 15th July, 1840, relating to the affairs of the Levant, once more attracted Great Britain within the sphere of the influence of the northern powers; and prepared the way for the treaty of the 20th December,

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<sup>1</sup> Mr. Canning's Speech in the House of Commons on the British armed intervention in the affairs of Portugal, 11th December, 1826. (*British Annual Register*, vol. lxxviii. p. 192.)

1841, by which the right of search was at last conceded by those powers who had been formerly the great champions of neutral maritime rights.

In the meantime the slave trade continued to be carried on to an enormous extent, and with circumstances of cruelty augmented by the very measures adopted for its suppression. This notorious fact is attested by the British diplomatic correspondence upon this subject, by the reports of the African Institution in London, and by those made from the committees of the American congress and British parliament. No little proportion of this traffic in human flesh and blood was carried on under the Spanish and Portuguese flags with British capital, on British account, and in vessels built in London and Liverpool.<sup>c</sup> The trade had been nominally prohibited by Spain to her subjects from the 31st of May, 1820, on all parts of the African coast, both south and north of the equinoctial line; but Portugal still continued to cling to that portion she had reserved south of the equator. In 1821, there was not a single flag of any European state that could lawfully cover the traffic to the north of the equator; yet down to the year 1830, and we may add down to the present time, the fraudulent importation of African slaves actually continued, if it was not openly countenanced, from the Rio de la Plata to the Amazon, and throughout the whole West Indian archipelago.<sup>d</sup> The commercial cupidity of individuals, the financial and political interests of states, and the inveterate habits of ages, by which Africa has been condemned to barbarism from the earliest records of history, were too pow-

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<sup>c</sup> In the debate in the house of commons on the 9th February, 1818, Lord Castlereagh said, "It would be a great error to believe that the reproach of carrying on the slave trade illegally belonged only to the other countries. In numberless instances, he was sorry to say, it had come to his knowledge that British subjects were indirectly and largely engaged."

<sup>d</sup> Report of the House of Representatives in the American Congress, 16th February, 1825.

erful to be overcome by the mere operation of laws and treaties, aided by the zealous efforts of benevolent individuals and associations, within the short compass of a few brief years. "MAN," says Sir Thomas Fowell Buxton, "has ever been the great staple article of exportation from Africa, by which chiefly her inhabitants have acquired the luxuries of civilized life." That most zealous, constant, and enlightened advocate of the slave trade abolition has recently retired from the contest in disgust and despair ; (so far as the means hitherto pursued for its execution are concerned ; ) after having conclusively shown that what was true in 1830 remains true to this day, and that no actual progress has been made in the suppression of the traffic, which, on the contrary, has rapidly increased since the abolition, both in the numbers of its victims and the sum total of their sufferings.<sup>†</sup> This should not, perhaps, dis-

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<sup>†</sup> Sir. T. F. Buxton, in his recent "History of the Abolition of the Slave Trade," has, in our opinion, established, from conclusive testimony and fair deductions, that more than 150,000 negroes are now transported across the ocean from the eastern and western coasts of Africa ;\* that the arms and other articles peculiarly adapted to the slave trade are still manufactured on the most extensive scale in Great Britain ; that the mortality of the middle passage is frightfully augmented by the very precautions which are rendered necessary to escape from the vigilance of the cruisers : and whilst double the number of human victims are sacrificed to this accursed traffic than at the time when Clarkson and Wilberforce began their philanthropic labours, each individual suffers tenfold more from the contracted space in which they are stowed, every thing being sacrificed to fast sailing. He considers the measure of abolition as having totally failed, not for want of energy and perseverance in its execution, but from a total mistake as to the true means of accomplishing the object. His opinion is that Great Britain will never be able to obtain the assent of *all* nations to the exercise of the right of search for this object ; and even if she did obtain the assent of all, the advantage would be illusory. That even if to this concession were superadded the introduction of a new public law, by which the traffic should be denounced and punished as piracy under the law of nations, it

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\* Whilst Mr. Pitt and Mr. Fox computed the numbers carried over in 1792 at only 80,000.

courage more ardent and energetic partisans of the measure, if any such there be ; but, at least, it should render them cautious in selecting the means by which they would seek to attain an object which has hitherto eluded their grasp, and, like the mirage of the African desert, fled before them as they seemed to approach its borders. But above all, they should take care that among these means be not included an invasion of the sovereign rights of foreign states, as independent of Great Britain as Great Britain is of them. They should remember that their greatest civilian has said, speaking of this very subject, that " no one nation has a right to force the way to the liberation of Africa by trampling on the independence of other states ; or to procure an eminent good by means that are unlawful ; or to press forward to a great principle by breaking through other great principles that stand in the way."<sup>u</sup>

We have already observed that so long as the European war continued, the British laws, abolishing the slave trade as to their own subjects, were executed by means of the belligerent right of visitation and search, so far as the neutral flag was used to cover the illicit traffic still carried on with British capital and on British account. Vessels captured and brought in for adjudication under the exercise of this right, though they might not prove to belong to an

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would be all in vain ; the enormous profits (more than one hundred and fifty per cent) made by it affording a premium which counteracts every precaution which can possibly be taken to execute the prohibitory laws and treaties. He, therefore, concludes that the trade will never be destroyed by the means heretofore devised. The African, until civilized, will never cease to desire arms, ardent spirits, and other luxuries, nor to purchase them in exchange for men, which have ever been the great staple article of exportation from that continent. The true means of repression to be adopted are to civilize, and Christianize, and colonize Africa, by which the native chieftans would cease to have an interest in dealing in human flesh.

<sup>u</sup> See the judgment of Sir William Scott (since Lord Stowell) in the case of the French slave trade ship, *le Louis*. (Dodson's Admiralty Reports, vol. ii. p. 238.)

enemy, were condemned, according to the well known fiction and formula of the prize courts, as *enemy's property*, in case of proof that they had fraudulently assumed the neutral flag in order to cover British interests in a traffic interdicted by the British parliament to those who were amenable to its laws. On principle, it would seem that the belligerent right of capture and condemnation in this respect could not be carried further than thus incidentally to execute the municipal statutes of the belligerent state, by rejecting the claim of a subject of that state, whose property should be taken in violating its revenue laws, or laws of trade, and brought in for adjudication in the admiralty courts of his own country. But a case occurred in 1810, in which the doctrine was carried much further, and extended to property belonging to a *neutral* state, and taken in the act of violating the municipal laws of the owner's country. Such was the case of the *Amadie*, an American vessel employed in transporting slaves from the coast of Africa to a Spanish American colony. The vessel was captured, with the slaves on board, by a British cruiser; and the vessel and cargo condemned to the use of the captors in the vice-admiralty court at Tortola. On appeal to the lords of appeal in prize and plantation causes, the sentence was affirmed. The judgment of the appellant court was delivered by Sir William Grant in the following terms :—

“ This ship must be considered as being employed, at the time of capture, in carrying slaves from the coast of Africa to a Spanish colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is an American, complains of the capture, and demands from us the restitution of property of which he alleges that he has been unjustly dispossessed. In all the former cases of this kind which have come before this court, the slave trade was liable to considerations very different from those which belong to it now. It had, at



that time, been prohibited (so far as respected carrying slaves to the colonies of foreign nations) by America, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as judges in a British court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence.

“When I say *abstractedly speaking*, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *prima facie* the trade is illegal, and thus to throw on claimants the burden of proof that in respect of them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say that a claimant can have no right, upon principles of universal law, to claim the restitution in a prize court of human beings carried as slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed to which he ought to be restored. In this case the laws of the claimant's country allow of no property such as he claims. There can, therefore, be no right to restitution. The consequence is that the judgment must be affirmed.”<sup>v</sup>

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<sup>v</sup> Acton's Admiralty Reports, vol. i. p. 240. Fifth Report of the Directors of the African Institution, pp. 11-13.

It may seem amazing that such a judicial mind as that of Sir William Grant, at once acute and discriminating, whose clear judgment was not likely to be disturbed by passionate sympathy in the cause of abolition, should have arrived at such a conclusion from such premises. What a rapid stride must public opinion have taken in England, since the time when she extorted from Spain at the peace of Utrecht the *Assiento* contract, securing the monopoly of the slave trade with the Spanish colonies, "as the whole price of the victories of Ramillies and Blenheim;" when she "higgled at Aix la Chapelle for four years longer of this exclusive trade;" when "in the treaty of Madrid, she clung to the last remains of the *Assiento* contract;" and, to come nearer the moment this anomalous judgment was pronounced, when Lord Eldon, opposing the abolition as the leader of the court party in parliament in 1807, entered into a review of the measures adopted by England respecting the trade, which, he contended, "Had been sanctioned by parliaments in which sat the wisest lawyers, the most learned divines, and the most excellent statesmen;" when Lord Hawksbury (afterwards Earl of Liverpool) moved that the words, "inconsistent with the principles of justice and humanity," should be struck out of the preamble to the slave trade abolition bill; when the Earl of Westmoreland declared that, "Though he should see the Presbyterian and the prelate, the Methodist and field-preacher, the Jacobin and murderer, unite in favour of the measure of abolition, he would raise his voice against it in parliament!"\*—what a rapid stride, we repeat, must public opinion have taken in England in the brief interval between these speeches in the house of lords and the delivery of the above judgment at the cock-pit, for such a self-balanced mind as that of Sir William Grant to be thrown from its centre by the abstractions which form the basis of his judgment, and

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\* Hansard's Parliamentary Debates, vol. viii.

by which the high court in which he presided was induced to usurp the illegitimate power of executing the penal laws of another independent country !

In the case of the *Fortuna*, determined in 1811, in the high court of admiralty, on appeal from the inferior court, Lord Stowell, with evident reluctance and against the manifest convictions of his own superior mind, condemned another American vessel with her cargo as destined to be employed in the African slave trade. In delivering his judgment in this case, he stated, that an American ship, *quasi* American, was entitled, upon proof, to immediate restitution ; but she might forfeit, as other neutral ships might, that title, by various acts of misconduct, by violations of belligerent rights most clearly and universally. But though the prize court looked primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it had extended itself a good deal beyond considerations of that description only. It had been established by recent decisions of the supreme court, that the court of prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country *in the case of a British vessel* which, in the course of a prize proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle had been incorporated into the prize law of this country within the last twenty years, and seemed now fully incorporated. A late decision in the case of the *Amadie* seemed to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the law of that country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. The *Amadie* was an American ship employed in carrying on the slave trade ; a trade which this country, *since its own abandonment of it*, had deemed repugnant to the law of nations, to justice, and humanity ; though without presuming so to

consider and treat it where it occurs in the practice of the subjects of a state which continued to tolerate and protect it by its own municipal regulations : but it put upon the parties the burden of showing that it was so tolerated and protected ; and in failure of producing such proof, proceeded to condemnation, as it did in the case of that vessel.

“ How far that judgment has been universally concurred in and approved,” continued Lord Stowell, “ is not for me to inquire. *If there be those who disapprove of it, I certainly am not at liberty to include myself in that number, because the decisions of that court bind authoritatively the conscience of this ; its decisions must be conformed to, and its principles practically adopted.* The principle laid down in that case appears to be, that the slave trade carried on by a vessel belonging to a subject of the United States is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore turn out to be an American, actually so employed ; it matters not, in my opinion, in what stage of the employment, whether in the inception, or the prosecution, or the consummation of it ; the case of the *Amadie* will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation.”<sup>x</sup>

In a subsequent case, that of the *Diana*, Lord Stowell limited the application of the doctrine invented by Sir W. Grant to the special circumstances which distinguished the case of the *Amadie*. The *Diana* was a Swedish vessel, captured by a British cruiser on the coast of Africa whilst actually engaged in carrying slaves to the Swedish West India possessions. The vessel and cargo were restored to the Swedish owner, on the ground that Sweden had not then prohibited the trade, by law or convention, and still

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<sup>x</sup> Dodson's Admiralty Reports, vol. i. p. 81. Fifth Report of the Committee of the African Institution, p. 15.

continued to tolerate it in practice. It was stated by Lord Stowell, in delivering the judgment of the high court of admiralty in this case, that England had abolished the trade as unjust and criminal ; but she claimed no right of enforcing that prohibition against the subjects of those states which had not adopted the same opinion ; and England did not mean to set herself up as the legislator and *custos morum* for the whole world, or presume to interfere with the commercial regulations of other states. The principle of the case of the *Amadie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, British tribunals would hold it to be illegal, upon general principles of justice and humanity ; but they would respect the property of persons engaged in it under the sanction of the laws of their own country.<sup>7</sup>

The above three cases arose during the continuance of the war, and whilst the laws and treaties prohibiting the slave trade were incidentally executed through the exercise of the belligerent right of visitation and search.

In the case of the *Diana*, Lord Stowell had sought to distinguish the circumstances of that case from those of the *Amadie*, so as to raise a distinction between the case of the subjects of a country which had already prohibited the slave trade, from that of those whose government still continued to tolerate it. At last came the case of the French vessel called the *Louis*, captured after the general peace by a British cruiser, and condemned in the inferior court of admiralty. Lord Stowell reversed the sentence in 1817, discarding altogether the authority of the *Amadie* as a precedent, both upon general reasoning which went to shake that case to its very foundations, and upon the special ground, that even admitting that the trade had been actually prohibited by the municipal laws of France (which was doubtful,) the right of visitation and search (being an ex-

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<sup>7</sup> Dodson's Admiralty Reports, vol. i. p. 95.

clusively belligerent right,) could not consistently with the law of nations be exercised in time of peace to enforce that prohibition by the British courts upon the property of French subjects. In delivering the judgment of the high court of admiralty in this case, Lord Stowell held that the slave trade, though unjust and condemned by the statute law of England was not piracy, nor was it a crime by the universal law of nations. A court of justice, in the administration of law, must look to the legal standard of morality, — a standard which, upon a question of this nature, must be found in the law of nations as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized states ; and looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal. To make it piracy or a crime by the universal law of nations, it must have been so considered and treated in practice by all civilized states, or made so by virtue of a general convention.

The slave trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet entirely prohibited by France. It was not therefore, a criminal traffic by the consuetudinary law of nations ; and every nation, independently of special compact, retained a legal right to carry it on. No nation could exercise the right of visitation and search upon the common and unappropriated parts of the ocean, except upon the belligerent claim. No one nation had a right to force its way to the liberation of Africa by trampling on the independence of other states ; or to procure an eminent good by means that are unlawful ; or to press forward to a great principle by breaking through other great principles that stand in the way. The right of visitation and search on the high seas did not exist in time of peace. If it belonged to one nation, it equally belonged to all, and would lead to gigantic

mischief and universal war. Other nations had refused to accede to the British proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace.\*

The leading principles of this judgment were confirmed in 1820, by the court of king's bench, in the case of *Madrazo v. Willis*, in which the point of the illegality of the slave trade under the general law of nations came incidentally in question. The court held that the British statutes against the slave trade were applicable to British subjects only. The British parliament could not prevent the subjects of other states from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it was impossible to say that the slave trade is contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned could only be rendered illegal, on the principles of international law, by the consent of all the powers. Many states had so consented, but others had not; and the adjudged cases had gone no further than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it.†

A similar course of reasoning was adopted by the supreme court of the United States in 1825; in the case of Spanish and Portuguese vessels engaged in the slave trade, whilst that trade was still tolerated by the laws of Spain and Portugal, captured by American cruisers, and brought in for adjudication in the admiralty courts of the Union. In delivering the judgment of the supreme court in one of these cases, Mr. Chief Justice Marshall stated that it could hardly be denied that the slave trade was contrary to the

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\* Dodson's Admiralty Reports, vol. ii. p. 210.

† Barnwell & Alderson's Reports, vol. iii. p. 353.

law of nature ; that every man had a natural right to the fruits of his own labour was generally admitted ; and that no other person could rightly deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But from the earliest times war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity, one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of all must be the law of all.

Slavery, then, had its origin in force ; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful.

Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captures. But this triumph had not been universal. The parties to the modern law of nations do not propagate their principles by force ; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was, could those who had renounced this law be permitted to participate in its effects, by purchasing the human beings who are its victims ?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages,—the national acts and the general assent of that portion of the world, of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favour of the legality of the trade. Both Europe



and America embarked in it ; and for nearly two centuries it was carried on without opposition and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally or by deprivation of property.

In this commerce, thus sanctioned by universal consent every nation had an equal right to engage. No principle of general law was more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be divested only by consent ; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations ; and this traffic remained lawful to those whose government had not forbidden it.

If it was consistent with the law of nations, it could not in itself be piracy : it could be made so only by statute ; and the obligation of the statute could not transcend the legislative power of the state which might enact it.

If the trade was neither repugnant to the law of nations nor piratical, it was almost superfluous to say in that court that the right of bringing in for adjudication in time of peace, even where the vessel belonged to a nation which had prohibited the trade, could not exist. The courts of justice of no country executed the penal laws of another ; and the course of policy of the American government on the subject of visitation and search would decide any case against the captors in which that right had been exercised by an American cruiser, on the vessels of a foreign nation not violating the municipal laws of the United States. It followed, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace by an

American cruiser, and brought in for adjudication, would be restored to the original owners.<sup>b</sup>

We thus perceive that the highest judicial authorities in both countries concur in declaring that the African slave trade is not prohibited by the general law of nations ; and that so far as prohibited by the municipal laws of particular states, or by special compacts between particular states, such prohibition can only be enforced by the tribunals of that country in which it has been enacted, or, in the other alternative, of such countries as are parties to the compact. That if the slave trade be not unlawful by the general law of nations, still less can it be considered as piracy under that law, to be punished as such in a court of the law of nations. That the right of visitation and search on the high seas by the armed and commissioned vessels of one nation upon the merchant vessels of another, does not exist in time of peace, unless by special compact, binding only on those who have freely consented to become parties to such compact. And that, consequently, the right of visitation and search cannot be thus exercised in time of peace, for the purpose of bringing in for adjudication the vessels of any nation suspected of being engaged in the slave trade, whether the trade has been prohibited by the municipal laws of that nation or not, unless it has expressly consented to the exercise of the right for that purpose.

Such was the state of judicial opinion in England respecting the legality of the slave trade according to the recognized principle of public law, when a joint address of the two houses of parliament was presented to the Prince Regent on the 9th of July, 1819, congratulating his royal highness upon the success which had crowned the efforts of the British government for the suppression of the slave trade ; that guilty traffic having been declared by the concurrent voice of all the great powers of Europe, assembled

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<sup>b</sup> Wheaton's Reports, vol. x. p. 66. *The Antelope*.

in congress, to be repugnant to the principles of humanity and of universal morality.

That, consequently, on this declaration, all the states whose subjects were formerly concerned in this criminal traffic had since prohibited it, the greater part absolutely and entirely ; some, for a time, partially, on that part of the coast of Africa only which is to the north of the line : of the two states (Spain and Portugal) which still tolerated the traffic, one would soon cease to be thus distinguished ; the period which Spain had solemnly fixed for the total abolition of the trade being near at hand : one power alone (Portugal) had hitherto forborne to specify any period when the traffic should be absolutely prohibited.

That the United States of America were honourably distinguished *as the first which pronounced the condemnation of the guilty traffic* ; and that they had since successively passed various laws for carrying their prohibition into effect :

That, nevertheless, the two houses of parliament could not but hear with feelings of deep regret, that, notwithstanding the strong condemnation of the crime by all the great powers of Europe and by the United States of America, there was reason to fear that the measures which had been hitherto adopted for actually suppressing these crimes were not yet adequate to their purpose :

That they never, however, could admit the persuasion that so great and generous a people as that of France, which had condemned this guilty commerce in the strongest terms, would be less earnest than the British nation to wipe away so foul a blot on the character of a Christian people :

That they, if possible, were still less willing to admit such a supposition in the instance of the United States ; a people derived originally from the same common stock with the British nation, and favoured, like them, in a degree hitherto perhaps unequalled in the history of the world,

with the enjoyment of civil and religious liberty, and all their attendant blessings :

“ That the consciousness *that the government of this country was originally instrumental in leading the Americans into this criminal course*, must naturally prompt us to call on them the more importunately to join us in endeavouring to put an entire end to the evil of which it is productive.”

The address further stated that the two houses of parliament conceived that the establishment of some concert and coöperation in the measures to be taken by the different powers for the execution of their common purpose, might, in various respects, be of great practical utility ; and that, under the impression of this persuasion, several of the European states had already entered into conventional arrangements for seizing vessels engaged in the criminal traffic, and for bringing to punishment those who should still be guilty of these nefarious practices :

That they, therefore, supplicated his royal highness to renew his beneficent endeavours, more especially with the governments of France and of the United States of America, for the effectual attainment of an object which all professed equally to have in view ; and they could not but indulge the confident hope that their efforts might yet, ere long, produce their desired effect,—might ensure the practical enforcement of principles universally acknowledged to be undeniably just and true,—and might obtain for the long afflicted people of Africa the actual termination of their wrongs and miseries,—and might destroy for ever that fatal barrier which, by obstructing the ordinary course of civilization and social improvement, had so long kept a large portion of the globe in darkness and barbarism, and rendered its connection with the civilized and Christian nations of the earth a fruitful source only of wretchedness and desolation.\*

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\* Fourteenth Report of the African Institution, pp. 4-7.

Sustained with the support given by this parliamentary address, Lord Castlereagh once more renewed the efforts he had previously made to secure the assent of the American government to the exercise of the right of visitation and search in time of peace as a means of more effectually suppressing the slave trade.

In consequence of his lordship's instructions, Sir Stratford Canning, the British minister at Washington, presented to Mr. John Quincy Adams, secretary of state of the American government, a note, under date of 20th of December, 1820, stating that notwithstanding all that had been done on both sides of the Atlantic for the suppression of the African slave trade, it was notorious that an illicit commerce, attended with aggravating suffering to its unhappy victims, was still carried on; and that it was generally acknowledged that a combined system of maritime police could alone afford the means of putting it down with effect.

The note further stated, that the concurrence of principle in the condemnation and prohibition of the slave trade, which had so honourably distinguished the British parliament and American congress, seemed naturally and unavoidably to lead to a concert of measures between the two governments, the moment such coöperation was recognized as necessary for the accomplishment of their mutual purpose. It could not be anticipated that either of the parties, discouraged by such difficulties as are inseparable from all human transactions of any magnitude, would be content to acquiesce in the continuance of a practice so flagrantly immoral, especially at the (then) present favourable period, when the slave trade was completely prohibited to the north of the equator, and countenanced by Portugal alone to the south of that line.

The note concluded by stating, that Mr. Adams was fully acquainted with the particular measures recommended by his majesty's ministers as best calculated, in their opinion, to attain the object which both parties had in view;

but he need not be reminded that the British government was too sincere in the pursuit of that common object to press the adoption of its own proposal, however satisfactory in themselves, to the exclusion of any suggestions equally conducive to the same end, and more agreeable to the institutions or prevailing opinions of other nations.

In his reply to this note, Mr. Adams stated, that the proposals made by the British government to the United States, inviting their accession to the arrangements contained in the treaties relating to the slave trade with Spain, Portugal, and the Netherlands, to which Great Britain was a reciprocal contracting party, had been again taken into consideration by the President, with an anxious desire of contributing to the final suppression of the trade to the utmost extent of the powers within the competency of the federal government, and by means compatible with its duties in respect to the rights of its own citizens and the principles of its national independence.

The reply further stated, that at an earlier period of the communications between the two governments upon this subject, the President, in manifesting his sensibility to the amicable spirit of confidence with which the measures concerted between Great Britain and some of her European allies had been made known to the United States, and to the candid offer of admitting them to a participation in those measures, had instructed the American minister in London to represent the difficulties which placed the President under the necessity of declining the proposal. These difficulties resulted, as well from *certain principles of international law of the deepest and most painful interest to the United States*, as from limitations of authority prescribed by the American people to the legislative and executive depositories of the national power. On this occasion it had been represented, that a compact, giving the power to the naval officers of one nation to search the merchant vessels of another for offenders and offences against the latter, backed by a further power to seize and carry into a foreign

port, and there subject to the decision of a tribunal composed of, at least, one-half foreigners, irresponsible to the supreme corrective tribunal of the American Union, and not amenable to the control of impeachment for official misdemeanour, was an investment of power over the persons, property, and reputation of the citizens of that country, not only unwarranted by any delegation of sovereign power to the national government, but so adverse to the elementary principles and indispensable securities interwoven in all the political institutions of the United States, that not even the most unqualified approbation of the ends to which the proposed organization of authority was adopted, nor the most sincere and earnest wish to concur in every suitable expedition for their accomplishment, could reconcile it to those sentiments and principles of which, in the estimation of the American people and government, no consideration whatever could justify the transgression.

Mr. Adams also referred, in his reply to the note of Sir Stratford Canning, to several conferences between them, in which the subject had been fully and freely discussed and in which the incompetency of the power of the American government to become a party to the institution of tribunals organized like those stipulated in the treaties above noticed, and the incompatibility of such tribunals with the constitutional rights guaranteed to every citizen of the Union, had been shown by references to the fundamental principles of the American government, by which the supreme, unlimited, sovereign power is considered as inherent in the whole body of the people; whilst its delegations are limited and restricted by the terms of the instruments sanctioned by them, under which the powers of legislation, judgment, and execution, are administered, and by special indications of those articles in the constitution of the United States which expressly prohibit their constituted authorities from erecting any judicial courts, by the forms of the process belonging to which American citizens should be called to answer for any penal offence without the intervention of

a grand jury to accuse and of a jury of trial to decide upon the charge.

But, while regretting that the character of the organized means of coöperation for the suppression of the African slave trade proposed by Great Britain did not admit of the President's concurrence in the adoption of them, he had been far from the disposition to reject or discountenance the general proposition of concerted coöperation with Great Britain to the accomplishment of the common end—the suppression of the slave trade. For this purpose, armed cruisers of the United States had been for some time kept stationed on that coast which was the scene of this odious traffic,—a measure which the American government intended to continue without intermission. As there were armed British vessels charged with the same duty, Mr. Adams was directed by the President to propose that instructions, to be concerted between the two governments, with a view to mutual assistance, should be given to the commanders of the vessels respectively assigned to that service; that they should be ordered, whenever convenient to cruise in company together, to communicate mutually all information which might be useful to the execution of their respective duties, and to give each other every assistance compatible with their own service and adapted to the end which was the common object of both parties.

These measures, it was added, congenial to the spirit which had so long and so steadily marked the policy of the United States in the vindication of the rights of humanity, would, it was hoped, prove effectual to the purposes for which their coöperation was desired by the British government, and to which the American Union would continue to direct its most strenuous and persevering exertions.

In a despatch from Lord Castlereagh to Sir Stratford Canning, dated the 25th of March, 1821, the former expressed his disappointment that the counter proposal of the American government fell so far short of the object which the British government had in view; but Sir Stratford Can-



ning was instructed to communicate to the American government the instructions under which the British naval force stationed in the African seas was acting, and to inform it that additional instructions would immediately be sent to the British vessels engaged in that service to coöperate with such American vessels as might be employed in those seas for the extinction of the traffic.<sup>d</sup>

It appears, then, that the American government still adhered, in 1820-21, to their original objections to the concession of the right of visitation and search as demanded by the British government.

On the 29th of January, 1823, Sir Stratford Canning once more addressed an official letter on this subject to Mr. Adams, stating that the British government still remained convinced that the only effectual means of suppressing the traffic was to be found in the proposed mutual concession of the right of search. He, at the same time, invited the communication on the part of the American government of some efficient counter proposal originating with itself. The letter also requested the American cabinet to give instructions to its envoy at Paris to concur with the British ambassador in a joint representation to the French government on the subject of the slave trade, which still continued to be carried on under the French flag.

On the 8th of March, 1823, a resolution passed the house of representatives, "That the President of the United States be requested to enter upon, and to prosecute, from time to time, such negotiation with the several maritime powers of Europe and America, as he may deem expedient, for the effectual abolition of the African slave trade and its ultimate denunciation as piracy, under the law of nations, by the consent of the civilized world."

On the 31st March, 1823, Mr. Adams replied to Sir S.

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<sup>d</sup> Supplement to the Annual Report of the Directors of the African Institution for the year 1821, pp. 151-157.

Canning's letter, stating that the answer had been delayed, not by any abatement of the interest felt by the American government for the final suppression of the slave trade, nor by any hesitation as to persevering in its former refusal to submit their vessels and citizens to the search of foreign officers upon the high seas, but by an expectation that the proceedings in congress would indicate to the executive government views upon which it might be enabled to substitute a proposal more effectual for this purpose and less objectionable than that to which the United States could not be reconciled, namely that of granting the right of search. These proceedings had resulted in the above resolution, which would doubtless have obtained the sanction of the senate, had there been time to collect the opinion of that branch of the national legislature before the close of the session. The President had, therefore, no hesitation in acting upon the expressed and almost unanimous sense of the house of representatives, so far as to declare the willingness of the American Union to join with other nations in the common engagement to pursue and punish those who shall continue to practice this crime, so reprobated by the just and humane of every country as enemies of the human race, and to fix them, irrevocably, in the class and under the denomination of pirates.

Mr. Adams also transmitted to Sir S. Canning a copy of the act of congress of the 15th May, 1820, by which any citizen of the United States, being of the crew of any *foreign* ship engaged in the slave trade, or *any* person whatever being of the crew of any ship owned, in the whole or in part, or navigated in behalf of American citizens, participating in the slave trade, is declared to have incurred the penalties of piracy, and made liable to atone for the crime with his life. The legislature of a single nation could go no farther to mark its abhorrence of this traffic, or to deter the people subject to its laws from contamination by the practices of others.

Mr. Adams further stated that if, as represented by Sir

S. Canning, the French flag was more particularly employed to cover the illicit trade on the coast of Africa, and to conceal the property and persons of individuals bound to other allegiances, the act of Congress above mentioned made every American citizen concerned in such covered trade liable, when detected, to suffer an ignominious death. The code of Great Britain herself had hitherto provided no provision of equal severity in the prosecution of her subjects, even under the shelter of foreign flags and the covert of simulated papers and property.

Mr. Adams concluded by stating that he was instructed by the President to propose the adoption by Great Britain of the *principles* of this act, and to offer a mutual stipulation to annex the penalties of piracy to the offence of participating in the slave trade by the citizens or subjects of the two countries. This proposal was made as a substitute for that of conceding the mutual right of search, and of a trial by mixed commissions, which would be rendered useless by it. Should it meet the approbation of the British government, it might be separately urged upon the adoption of France and the other European powers in the manner most conducive to its ultimate success.

This counter-proposal, which had been invited by the intimation in Sir S. Canning's letter, calling for a substitute to the British proposal of a mutual concession of the right of search, was received by him in the most ungracious manner. Instead of answering the American counter-proposal, he proceeded, in his letter of the 8th of April, 1823, to discuss the original British proposal for the concession of a reciprocal right of search, and endeavoured to obviate the various objections which had induced the American government peremptorily to reject that proposal. He at the same time intimated that the captured vessels, instead of being tried before a mixed commission might be carried in for adjudication before the ordinary courts of admiralty of the captor's country, or before the similar courts of that country to which the captured vessels belonged. This in-

timation, he conceived, would remove the constitutional objections previously urged by the American cabinet against the proposed mixed commissions. But the first part only of this alternative was distinctly proposed by the British negotiator, and was considered by Mr. Adams in his reply as wholly inadmissible.

In his reply, dated the 24th June, 1823, the American secretary of state observed, that his offer was presented as a substitute for that of conceding a mutual right of search with a trial by mixed commissions, to which the United States could not be reconciled, and which would be rendered useless by the proposed substitute.

Sir S. Canning, in his letter of the 8th April, had intimated that the British government would be disposed to receive this offer only as an acknowledgment that measures, more efficient than any then generally in force, were indispensable for the suppression of the slave trade; and although it had never opposed the consideration of another plan brought forward as equally effective; yet having from the first regarded a mutual concession of the right of search as the *only* true and practical cure for the evil, their prevailing sentiment would be that of regret at the unfavourable view still taken of it by the American government. Sir S. Canning's letter therefore urged a reconsideration of it, and by presenting important modifications of the proposal heretofore made, removed some of the objections taken to it as insuperable, whilst it offered argumentative answers to the others which had been disclosed in the previous correspondence.

In the treaties concluded by Great Britain with Spain, Portugal, and the Netherlands, for the suppression of the slave trade, and communicated to the American government with an invitation to enter into similar engagements, three principles were involved, to neither of which that government felt itself at liberty to accede.

The 1st was the mutual concession of the right of search and capture, in time of peace, over merchant vessels on

the coast of Africa. The 2d was the exercise of that right even over vessels sailing under convoy of the public officers of their own nations ; and the 3d was the trial of captured vessels by mixed commissions in colonial settlements, under no subordination to the ordinary judicial tribunals of the country to which the party brought before them should belong.

In Sir S. Canning's letter of the 8th of April, an *expectation* was authorized that an arrangement for the adjudication of the vessels detained might leave them to be disposed of in the ordinary way, by the sentence of an admiralty court in the captor's country, or place them under the jurisdiction of a similar court in the country to which they belonged ; to the former alternative of which the British envoy anticipated the ready assent of the United States, in consequence of the aggravated nature of the crime as acknowledged by their laws, which would thus be "submitted to the jurisdiction of a *foreign* court of admiralty." But it was precisely because it was *foreign*, that the objection was taken to the trial by mixed commissions ; and if it transcended the constitutional authority of the United States' government to subject the persons, property, and reputations of their citizens to the decisions of a court partly composed of their own countrymen, it might seem needless to remark that the constitutional objection could not diminish, in proportion as its cause should increase, or that the power competent to make American citizens amenable to a court consisting of one-half foreigners, should be adequate to place their liberty, their fortune, and their fame at the disposal of tribunals *entirely foreign*.

Mr. Adams further remarked that the sentence of an admiralty court in the country of the captor was not the *ordinary* way by which the vessels of one nation, taken on the high seas by the officers of another, are tried in time of peace. There was in the ordinary way no right whatever existing to take, to search, or even to board them ; and he took that occasion to express the great satisfaction with

which the American government had seen this principle solemnly recognized by a recent decision of a British court of admiralty.\* Nor was the aggravated nature of the crime for the trial of which a tribunal may be instituted a cogent motive for assenting to the principle of subjecting American citizens, their rights and interests, to the decision of foreign courts; for although Great Britain, as Sir S. Canning remarked, might be willing to abandon those of her subjects who defied the laws and tarnished the honour of their country by participating in this traffic, to the dispensation of justice by foreign hands, the United States were bound to remember, that the power which enabled a court to try the guilty, authorized it also to pronounce upon the fate of the innocent; and that the very question of guilt or innocence was that which the protecting care of their constitution had reserved, for the citizens of the Union, to the exclusive decision of their own countrymen. This principle had not been departed from by the statute which had branded the slave trader with the name and doomed to the punishment of a pirate. The distinction between piracy by the law of nations and piracy by statute was well known and understood in Great Britain; and whilst international piracy subjected the transgressor guilty of it to the jurisdiction of any and every country into which he might be brought, or wherein he might be taken, statute piracy formed a part of the municipal code of the country where it was enacted, but could only be tried by its own courts.

There remained the suggestion, that the slave trader captured under the mutual concession of the power to make the capture might be delivered over to the jurisdiction of his own country. This arrangement would not be liable to the constitutional objection which must ever apply to the jurisdiction of the mixed commissions or of the admiralty courts

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\* Alluding, doubtless, to the judgment of Lord Stowell in the case of *Le Louis*.

of the captors ; and if Sir S. Canning's letter was to be understood as presenting it in the character of an alternative to which his government was disposed to accede, Mr. Adams was authorized to say that the President considered it as sufficient to remove the obstacle which had precluded the assent of the United States to the former proposals of the British government, resulting from the character and composition of the tribunals to which the question of guilt or innocence was to be committed.

The objections to the right of search, as incidental to the right of detention and capture, were also in a very considerable degree removed by the introduction of the principle that neither of them should be exercised, except under the responsibility of the captor in costs and damages to the tribunals *of the captured party*. This guard against the abuse of a power so liable to abuse would be indispensable ; but if the provisions necessary for securing effectually its practical operation, should reduce the right itself to a power merely nominal, the stipulation of it in a treaty would serve rather to mark the sacrifice of a great and precious principle, than to attain the end for which it would be given up.

In the objections heretofore disclosed to the proposed concession of the mutual right of search, the principal stress was laid upon the repugnance which such a concession would meet in the public feelings of the country, and of those to whom its interests were intrusted in that department of its government, the sanction of which was required for the ratification of treaties. The irritating tendency of the practice of search and the inequalities of its probable operation were only slightly noticed by Mr. Adams, and had been contested in argument, or met by propositions of possible palliatives, or remedies for anticipated abuses, in Sir S. Canning's letter. But the source and foundation of all these objections had been scarcely mentioned in their former correspondence. They consisted in the very nature of the right of search at sea, which, as recognized or tolerated by the usage of nations, was a right exclusively of

war, never exercised but by an outrage upon the rights of peace. It was an act analogous to that of searching the dwelling houses of individuals on land. The vessel of the navigator was his dwelling house ; and, like that, in the sentiment of every people that cherished the blessings of personal liberty and security, ought to be a sanctuary inviolable to the hand of power, unless upon the most unequivocal public necessity, and under the most rigorous personal responsibility of the intruder. Search at sea, as recognized by all maritime nations, was confined to the single object of finding and taking contraband of war. By the law of nature, when two nations conflict together in war, a third, remaining neutral, retained all its rights of peace and friendly intercourse with both. Each belligerent, indeed, acquired by war the right of preventing a third party from administering to his enemy the direct and immediate materials of war ; and, as incidental to this right, that of searching the merchant vessels of the neutral on the high seas to find them. Even thus limited, it was an act of power which nothing but necessity could justify, inasmuch as it could not be exercised but by carrying the evils of war into the abode of peace, and by visiting the innocent with some of the penalties of guilt. Among modern maritime nations an *usage* had crept in, not founded upon the law of nature, never universally admitted, often successfully resisted, and against which all had occasionally borne testimony by renouncing it in treaties,—of extending this practice of search and seizure to *all* the property of the enemy in the vessel of a friend. The practice was, in its origin, evidently an abusive and wrongful extension of the search for contraband ; effected by the belligerent, because he was armed ; submitted to by the neutral, because he was defenceless ; and acquiesced in by his sovereign, for the sake of preserving a remnant of peace rather than become himself a party to the war. Having thus occasionally been practiced by all as belligerents, and submitted to by all as neutrals, it had acquired the force of an usage, which, at the occur-



rence of every war, the belligerent may enforce or relinquish, and which the neutral may suffer or resist, at their respective options.

Mr. Adams forbore to enlarge upon the further extension of this practice, by referring to injuries which the United States experienced when neutral, in a case of vital importance ; because, in digesting a plan for the attainment of an object which both nations had equally at heart, it was desirable to avoid every topic which might excite painful sensations on either side. He had adverted to the interest in question from necessity,—it being one which could not be lost sight of in the then present discussion.

Mr. Adams further observed, that such being the view taken of the right of search, as recognized by the law of nations, and exercised by belligerent powers, it was due to candour to state that his government had an insuperable objection to its extension by treaty, in any manner whatever, lest it might lead to consequences still more injurious to the United States, and especially in the circumstances alluded to. That the proposed extension would operate, in time of peace, and derive its sanction from compact, presented no inducements to its adoption. On the contrary, they formed strong objections to it : every extension of the right of search, on the principles of that right, was disapproved. If the freedom of the sea was abridged by compact for any new purpose, the example might lead to other changes. And if the operation of the right of search were extended to a time of peace as well as war, a new system would be commenced for the dominion of the sea, which might eventually, especially, by the abuses to which it might lead, confound all distinctions of time and of circumstances, of peace and of war, and of rights applicable to each state.

The United States had, on mature considerations, thought it most advisable to consider the slave trade as piracy. They had thought that it might, with great propriety, be placed in that class of offences ; and that by placing it there, they would more effectually accomplish the great object of

suppressing the traffic than by any other measure which they could adopt.

To this measure none of the objections which had been urged against the extension of the right of search appeared to be applicable. Piracy being an offence against the human race, had its well known incidents of capture and punishment by death by the tribunal of every country. By making the slave trade piratical, it is the nature of the crime which draws after it the necessary consequence of capture and punishment. The United States had done this by an act of congress, in relation to themselves. They had also evinced their willingness, and expressed their desire, that the change should become general by the consent of every other power, by which it would be made the law of nations. Till then, they were bound by the injunction of their constitution to execute it, so far as respects the punishment of their own citizens, by their own tribunals. They considered themselves, however, at liberty, until that consent was obtained, to co-operate, to a certain extent, with other powers, in order to ensure a more complete effect to their respective acts; they placing themselves severally on the same ground by legislative provisions.

It was in this spirit, and for this purpose, that Mr. Adams had made to the British envoy the proposition then under consideration.

By making the slave trade piratical, and attaching to it the punishment as well as the odium incident to that crime, it was believed that much had been done by the United States towards suppressing it in their vessels and by their citizens. If the British government would unite in this policy, it was not doubted that the happiest consequences would result from it. The example of Great Britain, furnished in so decisive a manner, would not fail to attract the attention, and command the respect, of all her European neighbours. It was the opinion of the United States, that no measure short of that proposed would accomplish the object so much desired; and it was the earnest wish of the

American government that the government of his Britannic majesty might co-operate in carrying it into effect.

In a despatch dated on the same day with the letter we have just analysed, and addressed to Mr. Rush, the American minister in London, Mr. Adams recapitulates the incidents of the negotiation on this subject between the two governments, in 1820-21, in which the American government had peremptorily refused to concede the right of search in the form in which it was then proposed. He stated that the sentiments of the committee of the house of representatives, to whom had been referred the subject of the slave trade, were different from those of the executive government in respect to the right of search ; but that upon the passage of the resolution above recited, it was well ascertained that the sentiments of the house itself on that point coincided with those of the executive department, as developed in its previous correspondence with the British envoy ; since the house had explicitly rejected an amendment which was moved to the resolution, and which would have expressed an opinion of that body favourable to the mutual concession of the right.

The despatch to Mr. Rush then proceeds to observe that the general subject was resumed a short time before the decease of the Marquis of Londonderry by the British minister at Washington, Sir S. Canning, who suggested that since the total disappearance of the British and American flags from the trade, as well as those of the nations which had consented to confide the execution of their prohibitory laws to the superintendence of British naval officers, it continued to flourish under the flag of France ; that her laws, though in words and appearance equally severe in proscribing the traffic, were so remiss in the essential point of execution, that their effect was rather to encourage than to suppress it ; and the American government was urged to join in friendly representations to the French government by instructing the American envoy at Paris to concur with those which the British ambassador had been

charged with making, in order to ensure a more vigilant fulfilment of the prohibitory laws. This invitation was declined from an impression that such a concurrence might give umbrage to the French government, and tend rather to irritation than to the accomplishment of the object for which it was desired. Mr. Gallatin was, nevertheless, instructed separately to bring the subject to the notice of the French government, and did so by an official note, communicating copies of the recent laws of the American congress for the suppression of the trade, and especially of the act which subjected every citizen of the United States who should be polluted with it to the penalties of piracy.

Mr. Adams then refers to Sir S. Canning's letter to him of the 29th of January, calling upon the American government either to accede to the mutual right of search, emphatically pronounced in his belief to be the *only* effectual measure devised, or which was likely to be devised, "for the accomplishment of the end, or to bring forward some other scheme of concert," which the British envoy again declared his readiness to examine with respect and candour, as a substitute for that of the British cabinet.

However discouraging this call for an alternative might be, thus coupled with so decisive a declaration of belief that no effectual alternative had been, or was likely to be, devised, an opportunity was offered, in pursuance of the resolution of the house of representatives, for proposing a substitute, in the belief of the American government, more effectual than the right of search could be, for the total and final suppression of this nefarious trade, and less liable either to objections of principle or to abuses of practice.

This proposition was accordingly made in Mr. Adams' letter of the 31st of March, the answer to which, on the part of Sir S. Canning, barely noticed the proposition, to express an opinion that his government would see in it nothing but an acknowledgment of the necessity of further and more effectual measures; and then proceeded to an elaborate review of all the objections which, in the previous

correspondence, had been taken by the American government to the British connected proposal of a mutual right of search and a trial by mixed commissions.

These objections had been of two kinds : 1st, to the mixed commissions, as inconsistent with the American constitution : and 2d, to the right of search, as a dangerous precedent, liable to abuse and odious to the feelings and recollections of their country.

In Sir S. Canning's letter, the proposal of trial by mixed commissions was formally withdrawn, and an alternative presented as practicable, one side of which only, and that the inadmissible side, was distinctly offered, namely, that of trial by the courts of the captors.

The other side of the alternative would, indeed obviate their constitutional objection, and might furnish the means of removing the principal *inherent* objection to the concession of the right of search—that by which the searching officer is under no responsible control for that act.

But in their previous correspondence (continued Mr. Adams,) their strong repugnance to the right of search had been adverted to, merely as matter of fact, without tracing it to its source, or referring to its causes. The object of this forbearance had been to avoid all unnecessary collision with feelings and opinions which were not the same on the part of Great Britain and upon theirs ; Sir S. Canning's letter, however, professedly reviewing all the previous correspondence for the purpose of removing or avoiding the American objections, and contesting the analogy between the right of search, as it had been found obnoxious to America and as then proposed for her adoption by formal compact, Mr. Adams had been under the absolute necessity of pointing out the analogies which really existed between them, and of showing that as the right of search, independent of the right of *capture*, and irresponsible or responsible only to the tribunals of the captor, it was, as proposed, essentially liable to the same objections as when it had been exercised as a belligerent right. Its *encroaching* char-

acter, founded in its nature as an irresponsible exercise of force, and exemplified in its extension from search for contraband of war, to search for enemy's property, and thence to search for *men* of the searcher's own nation, was thus necessarily brought into view, and connected with the exhibition of the evils inherent in the practice, with that of the abuses which had been found inseparable from it.

The United States had declared the slave trade, so far as pursued by their citizens, piracy; and, as such, made it punishable with death. The resolution of the house of representatives recommended negotiations in order to obtain the consent of the civilized world to consider it as piracy under the law of nations. Those who were guilty of this offence against international law might be taken on the high seas, and tried by the courts of any nation. The principle which the American government would wish to introduce into the system, by which the slave trade should be recognized as piracy under the law of nations, would be, that though seizable by the officers and authorities of every nation, the offenders should be triable only by the tribunal of the country of the slave trading vessel. In committing to foreign officers the power, even in a case of conventional piracy, of arresting, confining, and delivering over for trial, a citizen of the United States, they felt the necessity of guarding his rights from all abuses, and from the application of any laws of a country other than his own.

A draft of a convention was, therefore, enclosed by Mr. Adams to Mr. Rush, which, if the British government should agree to treat upon the subject on the basis of a legislative prohibition of the slave trade by both parties, the latter was authorized to propose and conclude. This *projet* was not, however, offered to the exclusion of any other which might be proposed on the part of the British government, nor any of its articles to be insisted on as a *sine quâ non*, excepting that which made the basis of the whole arrangement to consist in the existence of laws in each

country, rendering liable their respective citizens and subjects to the penalties of piracy for the offence of slave trading, with a stipulation to use their influence with other states to the end that the trade might be declared to be piracy under the law of nations. It was only from considering the crime in the character of piracy that the United States could admit the visitation of their merchant vessels by foreign officers for any purpose whatever ; and, even in that case, only under the most effective responsibility of the officer for the act of visitation itself and for every thing done under it.

Mr. Rush was instructed, in case the sentiments of the British government were averse to the principle of declaring the slave trade piracy by a legislative act, not to propose or communicate the *projet* of convention. He would understand its objects to be two-fold ; to carry into effect the resolution of the house of representatives, and to meet the call so earnestly urged by the British government for a substitute for its proposal of the mutual right of search. The substitute, by declaring the offence piracy, carried with it the right of search for the pirates, as existing in the very nature of the crime. But to the concession of the right of search, distinct from that denunciation of the crime, the objections of the American government remained in all their original force.

It was subjoined in this despatch that it had been intimated that the proposition for recognizing the slave trade as piracy under the law of nations had been discussed at the congress of Verona, and that the American cabinet was expecting the communication of the papers on this subject promised by Lord Liverpool to be laid before parliament. Although the United States had been much solicited to concur in the measures of Great Britain and her allies for the suppression of the trade, they had always been communicated to the American government as purposes consummated, to which the *accession* of the United States was desired. From the general policy of avoiding to intermeddle with

European affairs, they had acquiesced in this course of proceedings ; but in order to carry into effect the resolution of the house of representatives, and to pursue future discussions with Great Britain, it was obviously proper that communications should be made to the American cabinet of the progress of European negotiations for accomplishing the common purpose, whilst it was still in deliberation. If the United States were to coöperate in the result, it was just that they should be consulted, at least with regard to the means which they were invited to adopt.<sup>f</sup>

It will thus be perceived that the American executive government and legislature of 1823-24, although sincerely desirous of coöperating with Great Britain for the suppression of the slave trade, continued to repel the proposition of a mutual concession even of the limited right of search, as a means to that end, so long as it was coupled with the consequence of carrying in the captured vessel for adjudication before a tribunal of the captor's country, or before a mixed commission composed of judges appointed jointly by both countries. To the former they objected, as identical with the exercise of the belligerent right of search in time of peace, attended with all its known abuses, of which the American people had already had sufficient experience ; to the latter, as subjecting their citizens to be tried before tribunals partly foreign, and thus to be deprived of those securities guarantied by their happy constitution and laws. The American cabinet would not, therefore, consent to negotiate upon any other basis than that of the enactment of a law by the British parliament similar to the act of congress of 1820, by which the citizens and subjects of each country respectively should be subjected to the penalties of piracy for the offence of trading in African slaves, with a mutual stipulation to use the respective influence of the two contracting parties with the other maritime and civilized

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<sup>f</sup> Nile's Weekly Register, vol. xxvi. pp. 347-353.



nations of the world, to the end that the African slave trade might be generally recognized as piracy under the law of nations.

This proposal seems to be substantially the same with that made by Great Britain at the congress of Verona, with the exception of two important distinctions in these respective plans. These are,—1st, That in the British proposal the intended concession of the right of search does not appear to have been indissolubly connected, as in the American plan, with the introduction of a new public law, by which the offence of trading in slaves should be declared piracy under the general law of nations, and thus subjected to the common jurisdiction of all maritime states, as in the case of piracy by the preëxisting law of nations. 2d, That the manner of exercising this jurisdiction was not clearly explained in the British proposal, but was probably meant to be referred to the ordinary admiralty jurisdiction of the captor's country, or to a mixed commission composed of judges jointly chosen by both parties. Whilst the American plan proposed the seizure of the offending persons and property by the commissioned vessels of war of either party for adjudication in the tribunals of that country to which the captured persons and property belonged.

The negotiation which ensued in consequence of the above instructions to Mr. Rush finally resulted in a convention signed by him with the British plenipotentiaries, Mr. Canning and Mr. Huskisson, on the 13th of March, 1824, on the basis proposed by the American government, of the separate laws of the two countries declaring the offence of the slave trade to be piracy when committed by the citizens or subjects of either country respectively, with a stipulation that the contracting parties should use their influence respectively, with other maritime and civilized powers, to the end that the African slave trade might be declared piracy under the law of nations. The convention provided for the mutual exercise of the right of visitation and search, under a variety of restrictions and regulations,

by the commissioned naval officers of each party, duly authorized, under the instructions of their respective governments, to cruise *on the coast of Africa, America, and the West Indies*, for the suppression of the slave trade. It further declared that any vessel of either country carrying on the illicit traffic in slaves, might be captured by the commissioned cruisers of the other, and delivered over, together with the persons found on board, for trial in some competent tribunal, of whichever of the two countries they should be found on examination to belong to, except when the vessel in question should be in the presence of a ship of war of its own nation.

The convention thus concluded was submitted, on the 30th of April, 1824, to the senate of the United States for their advice and consent to its ratification, as required by the American constitution in all cases of treaties negotiated by the President with foreign powers. It encountered much opposition in that body, and finally passed on the 22d of May by the constitutional majority of two-thirds of all the senators present, with the following important amendments :—

1st. The provision, extending the cruising ground of the armed vessels commissioned against the slave trade to the coast of *America* was stricken out, so that the limits within which the right of search might be exercised were restricted to the coasts of *Africa and the West Indies*.

2dly. A provision for the trial as pirates of individuals, citizens or subjects of either party, found on board a vessel sailing under the flag of a third power, was also stricken out.

3dly. A new article was proposed, by which it should be free to either of the contracting parties, at any time, to *renounce the convention, giving six months' notice beforehand.*<sup>s</sup>

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<sup>s</sup> Nile's Weekly Register, vol. xxvi. p. 233.

The British cabinet refused to accept the alterations proposed by the American senate to the convention, and objected especially to that amendment by which the words "of America" were proposed to be stricken out of the 2d article. In the official letter of Mr. Secretary Canning to Mr. Rush, dated the 37th of August, 1824, explanatory of this refusal, it was stated that the right of visiting vessels suspected of slave trading, when extended alike to the West Indies and the coast of America, implied an equality of vigilance, and did not necessarily imply the existence of grounds of suspicion on either side. The removal of this right, as to the coast of America, and its continuance as to the West Indies, could not but appear to imply the existence, on one side, and not on the other, of a just ground, either for suspicion, of misconduct, or apprehension of an abuse of authority.

To such an inequality, leading to such an inference, his majesty's government could never advise his majesty to consent. It would have been rejected if proposed in the course of negotiation. It could still less be admitted as a new demand after the conclusion of the treaty.<sup>h</sup>

In Mr. Secretary Adams' despatch to Mr. Rush, dated the 29th May, 1824, explanatory of the amendments proposed by the senate to the convention, it is stated that the exception of the *coast of America* from the seas, upon which the mutual power of capturing vessels under the flag of either party might be exercised, had reference, in the view of the senate, to *the coast of the United States*. On no part of that coast, unless within the Gulf of Mexico,<sup>i</sup> was there any probability that slave trading vessels would ever be

<sup>h</sup> Nile's Weekly Register, vol. xxvii. pp. 247-248.

<sup>i</sup> And Mr. Adams might have added that the greater part of the Gulf of Mexico would be included within the denomination of the West Indies. Vessels of war cruising between the island of Cuba and the southern cape of Florida on one side, and the peninsula of Yucatan on the other, would completely intercept slave trade in the gulf.

found? The necessity for the exercise of the authority to capture was, therefore, no greater than it would be *upon the coast of Europe*.<sup>†</sup> And we may add to this remark of Mr. Adams, that Great Britain is the last maritime power in the world that would consent to the exercise of the right of search, in peace or in war, upon those seas which wash her shores,—those seas over which she has ever asserted the supreme, absolute, and exclusive dominion. Well might the American senate insist upon the exemption of the Atlantic coast of the United States from the exercise of a right of search hitherto unknown to the law of nations, when they had already suffered so much from the abusive exercise of the belligerent right of search within their very bays and harbours, especially as it was notorious that the slave traders had ceased to frequent that coast ever since the importation had been effectively prohibited in 1808.

During the whole course of these negotiations between the United States and Great Britain, from 1818 to 1824, there is not the slightest trace of a pretension so much as intimated, much less avowed, on the part of the latter, of a right of visitation and search to be exercised on the high seas, in time of peace, for any purpose whatever, independent of special compact and the free concession of the power on whose vessels the right is to be exerted.

We now come to the treaties concluded in 1831 and 1833, between France and Great Britain, for the repression of the slave trade, by which the right of search was first conceded by the former power for this purpose.

These conventions limit the exercise of the right thus conceded, first, to the western coast of Africa, from the Cape Verd to the distance of ten degrees south of the equator,—that is to say, from the fifteenth degree of north latitude to the tenth degree of south latitude, and to the thirteenth degree of west longitude from the meridian of Paris.

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<sup>†</sup> Nile's Weekly Register, vol. xxvii. p. 246.

Secondly,—all around the island of Madagascar, within a *zone* of twenty leagues in breadth. Thirdly,—at the same distance from the coasts of the island of Cuba. Fourthly,—at the same distance from the island of Porto Rico. Fifthly,—at the same distance from the coast of Brazil; with the provision that the suspected vessels, descried and chased by the cruisers within the zone of twenty leagues, may be visited by them without these limits, if having kept the suspected vessels always in sight, they have not been able to reach them within that distance from the coast. The vessel thus captured to be carried in for adjudication before the competent court of the country to which they belong, there to be tried according to laws in force in that country.<sup>1</sup>

It is understood that soon after the conclusion of the supplementary convention of 1833, between Great Britain and France, for the more effectual suppression of the slave trade, a fresh overture was made by the British government to that of the United States, to accede to the principle of the two treaties of 1831 and 1833, by yielding the right of search on similar terms and conditions as therein stipulated between France and England. We are not aware that the papers relating to this overture, which is said to have been made by Lord Palmerston to the American cabinet, during the administration of General Jackson, have been published, and we are therefore unable to say whether it ever assumed the form of a serious negotiation between the two governments.

We come now to a very remarkable incident in the transactions relating to the suppression of the slave trade. We refer to the measure brought forward in the British parliament, in 1839, by the late ministry, to coerce Portugal into a more active participation in the accomplishment of this object. This measure, which might well be called a bill

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<sup>1</sup> Martens, *Nouveau Recueil*, tom. ix. p. 544.

of pains and penalties against an independent state, although professionally aimed only at that power, was of a very sweeping and extraordinary character, as will be explained by the following extract from the debate in the house of lords, on the 15th August, 1839 :—

“ Viscount Melbourne rose to move the second reading of the slave trade suppression bill. The present state of the question rendered it unnecessary to go at any length into the details, or state the grounds upon which he hoped for their lordships’ approval of that motion. Their lordships would perceive that the provisions and principles of that bill were clearly and distinctly stated in the preamble. It was to the effect, that persons who might be employed for the suppression of the slave trade should be indemnified against actions which might be commenced against them ; that the court of admiralty should be empowered to adjudicate on matters arising from these instructions ; and also, that government should be empowered to grant bounties, in cases of capture made under these directions of her majesty. Among the many nations, however, under whose flag that business was now carried on, he was sorry to say the Portuguese nation stood preëminent. Their lordships knew how the affair stood with regard to that nation ; and that, notwithstanding the treaty into which she had entered on the subject, she took no pains to carry out its provisions. He was not inclined to use any strong language on this matter ; but the last notice which had been presented to the Portuguese government by the British envoy, Lord Howard de Walden, so fully contained all the charges which might be made against that nation in this respect, that he would only call the attention of the house to that document. The noble viscount then read the document in question, the substance of which was, an accusation on the part of the writer against Portugal, for having, notwithstanding several treaties at various periods, still continued the slave trade, and refused to coöperate with her Britannic majesty in its suppression. He (Lord Melbourne) con-

ceived it unnecessary to go at greater length into that particular part of the case, and more particularly as, in an address of their lordships to the crown, they had come to the resolution of expressing their regret, that Portugal had not coöperated with Great Britain in suppressing the slave trade. Her majesty had complied with the prayer of that address, and had accordingly given instructions to her cruisers to take such measures as might be necessary for the purpose alluded to, and he (Lord Melbourne) now presented that bill for a second reading, which would enable the recommendation of their lordships to be carried out.

“ The Duke of Wellington opposed the bill on the same grounds on which he had been hostile to the late measure introduced on the subject. Some of the clauses, he said, it would be impossible to carry out without a breach of all our engagements on this subject with foreign powers. He proceeded to remark, that *there were some nations, and one great nation in particular, the United States, with whom this country had no treaties for putting down the slave trade.* Now, as to searching the vessels of the United States for papers, if he might judge from the correspondence of the consul at Havanna, there was every probability, not only that there would be no inclination on the part of the United States to permit the detention of their vessels, and the examination of their papers, but that that power would decidedly resist any such attempt on our part. (Hear, hear.) This was another reason, in his opinion, why measures on this subject should originate with government, who knew what means there were for carrying the purposes of the measures into execution, rather than with parliament. But there was another point of view on which to consider the question. The officers and persons commanding the vessels on this service, under the authority of the lord high commissioners of the admiralty, were to be indemnified from all the consequences, but the state could not be indemnified. (Hear, hear.) Now their lordships might rely upon it, that for every vessel of the United States detained

by our cruisers, for however short a time, this country would be held responsible for all the demurrage, and so on. The noble duke, after calling on their lordships not to take upon themselves the responsibility of this measure, moved that it be read a second time that day six months.

“ Lord Brougham must say, that the motion with which the noble and illustrious duke concluded his otherwise able and most temperate speech, gave him great concern. He deemed this bill to be of the greatest possible advantage, even if larger alterations might be thought fit to be made than he had reason to believe would be necessary, and he hoped their lordships would not reject the bill in its present stage, but allow it to go to a second reading, and have alterations which might be necessary made in committee. It could not, at the same time, be disguised, that we were peculiarly situated as to the United States, because we had not concluded any treaty with them conferring the right of search. It should be borne in mind, that the United States, at the very earliest period they were enabled to do so by the federal constitution, had adopted the abolition of the slave trade, and were the very first to make it piracy for any one of their citizens to carry it on.

“ Lord Wynford felt with the noble duke, that if this bill were to pass, six months would not elapse without seeing this country at war with every state in Europe which had ships, for it could not be carried into operation except by violating existing treaties. He could not consent to the second reading of the bill, nor did he see the advantage of allowing it to go into committee, as he could not see any alteration which could be made in it, which could at all meet the objections made by the noble duke. (Hear.)

“ The Bishop of London said, it was with the most sincere concern he felt himself called upon to vote against the amendment proposed by the noble duke. He had, ever since he was able to think upon this subject, been of opinion, that this *nation was especially appointed by divine providence, to undertake the task of putting an end to the slave*



*trade, and that her position amongst the maritime nations of the earth, which had given her the power, had at the same time imposed the duty of abolishing this unsanctified traffic.*

“The Lord Chancellor felt perfectly satisfied that their lordships would all concur in forwarding this measure, but for a mistake into which they appeared to have been led. Noble lords seemed to think, that by the enactment of this bill, French ships were to be searched, contrary to existing treaties. If that were the case their lordships would undoubtedly be warranted in opposing it, but these were not the enactments. The object of the bill was to direct where such search was to be made, and to exempt officers acting under the direction of her majesty from being subject to civil prosecutions in this country for acting under those orders. Certain orders had been issued by her majesty with respect to vessels engaged in the slave trade; and was it to be supposed that the officers employed in the suppression of this trade should carry out these orders at their own risk? These orders were issued in consequence of an address presented from their lordships to her majesty; these orders were in accordance with that address, and their lordships were only called upon by this bill to fulfil the engagement entered into by their address, and the answer to it, and to indemnify the officers who acted under them.

“Lord Ellenborough said, that if orders had been issued, those orders should be communicated to their lordships before they were called upon to afford indemnity to those who were to act upon them.

“Lord Melbourne said, that such a course of communicating the orders of her majesty to the house, was unprecedented.

“Lord Ellenborough thought, that in order to know what measures would be necessary, it was requisite that their lordships should be made aware of the nature of the orders which had been issued.

“Lord Minto said, that of all the astounding doctrines he had ever heard, was that which called upon her ma-

jesty's ministers to explain the terms of the instructions which had been sent out to her majesty's cruisers ; (hear, hear, from the ministerial benches ;) such a demand as this had never before been made, and he could not see how their lordships should now require to be put in possession of instructions which were given, as the noble duke himself had admitted they should be given, on the sole responsibility of the government. There was nothing, he contended in the present bill, calculated in the slightest degree to excite the jealousy of the government of the United States, which was as anxious as we were to put an end to the slave trade ; nor did the bill warrant the commission of any act which was not as fully warranted without it. The real question was, whether or not their lordships would co-operate in carrying into effect the address to which they had already agreed ?

" Lord Denman, and Lord Colville, supported the bill, which was approved by Lord Wicklow.

" Their lordships then divided, when the members were—

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The bill was accordingly read a second time and subsequently enacted into a law of the British parliament.

This attempt to enforce the abolition of the slave trade, against other independent states, by a British act of parliament, must appear the more extraordinary, as the complete exemption of the merchant vessels of one nation from every species and purpose of search by the armed and commissioned cruisers of another on the high seas, in time of peace, independent of special compact, had never been drawn in question in the various negotiations on the subject

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<sup>m</sup> London Times, August 16th, 1839.

of the slave trade between Great Britain and other maritime powers, the United States included, from the peace of Paris, 1814, to the signature of the treaty of 1833, with France. Every line of each document, and every word of each conference, implies, in the strongest manner, that no such notion had ever entered the minds of any one of the distinguished sovereigns, statesmen, and civilians, who had bestowed their attention on this important matter.

Not only so, but it is directly at war with an official communication made by Lord Palmerston to the government of the Republic of Hayti, under date of the 27th of January, 1840, a few months after the Portuguese slave trade suppression bill was brought into the house of commons by his lordship. In this communication, which is quoted by Mr. Stevenson, in his note to Lord Palmerston, of the 27th of February, 1841, the latter refers to a law passed in 1839, by the Haytian government, providing that any vessel, whether Haytian or otherwise, found in the act of slave trading, should be seized and brought into a port of the republic for adjudication. The communication, states, that—

“ Her majesty’s government wishes to draw the attention of the Haytian government to a matter of form in this law which may possibly give rise to embarrassments. The law enacts, that all vessels, whether Haytian or foreign, which may be found in the act of slave trading, shall be seized and brought into a Haytian port. Now, Hayti has undoubtedly a full right to make such an enactment about her own citizens and ships, but her majesty’s government apprehend that Hayti has no right to legislate for the ships and the subjects or citizens of other states. That in time of peace, no ships belonging to one state have a right to search and detain ships sailing under the flag of, and belonging to another state, without the permission of such state, which permission is generally signified by treaty; and if Haytian cruisers were to stop, search, and detain merchant vessels sailing under the flag of, and belonging to

another country, even though such vessels were engaged in the slave trade, the state to which such vessels belonged would have just grounds for demanding satisfaction and reparation from Hayti, unless such state had previously given to Hayti, by treaty, the right of search and detention."

The first time we hear of such a pretension, as that repelled by the British government in the above communication, being brought forward by that government in a diplomatic form, is in the correspondence between Mr. Stevenson, the American Minister in London, and the late and present British secretaries of state for foreign affairs, the Lords Palmerston and Aberdeen.

As the documents containing this correspondence are before the public in an accessible form, having appeared in almost all the public journals of both Europe and America, we deem it superfluous to subject the papers to that full and minute analysis which we have thought necessary in respect to the previous communications between the two governments on the same subject. We shall therefore endeavour to collect, in a summary form, from the entire correspondence, the real nature and import of the British pretension. In doing this, we think it but fair towards the British government to bestow more particular attention on the note transmitted from the foreign office to the American minister in London, since the late change of ministry; not because we do not, privately speaking, attach an equal importance to documents written and signed by Lord Palmerston, as to papers proceeding from under the hand of his noble successor in office. All that we mean to say is, that as our country has to deal in this momentous matter with the *present* British government, it is more important for us to determine what are its real views and intentions in respect to the question, so far as they can be collected from its official language, than to make the subject of commentary and criticism expressions which we fain would hope were hastily and incautiously used, in conference or in cor-

respondence, by the eminent statesman who lately filled the office of secretary of state for foreign affairs.

The several cases of American vessels seized by British cruisers in the African seas present examples, but too flagrant, of the abuses to which the exercise of such a right as that claimed by Great Britain on this occasion may be liable. The proceedings of the British cruisers on the coast of Africa, in one of these cases in particular (that of the *Mary*), is justly described by Mr. Stevenson, in his correspondence with Lord Palmerston, "as wanting nothing to give them the character of a most flagrant and daring outrage, and very little, if anything, to sink them into an act of open and direct piracy." Indeed, this attempt to exercise the rights of war in time of peace must not only be attended with all the evils consequent upon the exercise of the right of search for enemy's property and contraband of war; but as Lord Stowell has so justly observed, has an inevitable tendency to lead to "gigantic mischief and universal war," by provoking forcible resistance on the part of the navigator whose commerce is thus interrupted by the uncontrolled violence of foreign cruisers. The abuse of a right, such as the belligerent right of visitation and search, which all nations have occasionally exercised in turn, and none have at any time denied (at least so far as respects contraband and blockade) to be authorized by the *customary*, if not by the *natural* law of nations, may not be attended with the same fatal consequences as are to be apprehended from the exercise of the right now claimed. The exercise of the belligerent right of search may be effectually controlled by the courts of admiralty of the belligerent state, proceeding according to their established rules in decreeing costs and damages against the captor, in cases of seizure, without such reasonable grounds of suspicion as amount to probable cause. A forcible resistance to the exercise of this right by the belligerent cruiser, on the part of the neutral navigator, may be regarded as an unlawful act of violence, and punished in extreme cases even by the

confiscation of his property. But where is the maritime code, which instructs us in the nature of the securities provided against the abuse of the pretended right now, for the first time, asserted in the face of the world? In what court, and by what law, is the suspected vessel to be tried? If the seizure were made in time of war, the adjudication must necessarily take place, according to the well known law and usage of nations, in the prize court of the country of the captor, who is responsible to his own government, whose commission he bears, for his acts under that commission; and that government again is responsible over to the neutral state, whose subjects may complain of the injury by them sustained. If the seizure be made of a foreign vessel in time of peace or of war, under the municipal laws of the captor's country, prohibiting the slave trade, then it can only take place within the territorial jurisdiction of that state; and a seizure upon the high seas, or within the territorial jurisdiction of a third power, would be so plainly illegal, that we may lay it out of the question. The same thing may be affirmed of an attempt to seize for a breach of the municipal laws of the country to which the captured vessel belongs. If, again, the seizure be made of a British vessel, suspected to have usurped the flag and pass of a foreign state, then the validity of the seizure, and the question of jurisdiction itself must be made to depend upon the event of the trial. If, on the other hand, the seizure be made under the existing treaties between Great Britain, the Netherlands, Spain, &c., the trial must be had in the mixed commission court, created by those treaties—a stipulation, to the like of which the American government has constantly refused its assent. If it be made under the treaties of 1831 and 1833, between Great Britain and France, or under the more recent treaty between the five great European powers, signed at London, on the 20th December last, the vessel seized must be delivered over for trial to the competent tribunal of the nation to which she is suspected to belong. But how can such

tribunal acquire jurisdiction to determine the national character of the vessels of a third power, an absolute stranger to the compact under which the jurisdiction is to be exercised ?

All this is said upon the supposition that the visitation is followed by search, and the search by seizure, and the seizure by carrying in for adjudication. If the visitation is not accompanied by search, it is an idle ceremony, and a wanton interruption of the navigator in the prosecution of his voyage. It is by search only, by examining the ship's papers, construction, and cargo, by interrogating her officers and crew, that the boarding officer can ascertain whether, in his judgment, she is employed in the slave trade. And it is only by seizing and carrying in for adjudication, that it can be lawfully determined by some competent authority whether his suspicions are well or ill founded. We assert, therefore, that it affords a violent presumption against the existence of such a right, that its exercise may draw after it consequences far more fatal than those attending the ordinary belligerent right of search, which may always be, and sometimes actually is, restrained by known rules of practice, which make a part of the general law of nations as founded on usage.

On examining the letter of Lord Aberdeen to Mr. Stevenson, of the 13th October, 1841, we confess ourselves unable to collect from it the real nature of the distinction alleged to exist between the right claimed by the British government and the ordinary right of visitation and search. If his lordship has failed in expressing with sufficient clearness and precision the conceptions of his own mind, it is most certainly not for want of the requisite talents as a writer,—since his letter is written with the greatest terseness and elegance,—but ought rather to be attributed to the embarrassment occasioned by the intrinsic difficulties of a bad cause left him as an official legacy by his predecessor, and which the joint abilities of both might well prove insufficient to maintain. Be this as it may, Lord Aberdeen ex-

pressly asserts that he "renounces all pretension on the part of the British government to visit and search American vessels in time of peace. Nor is it *as American* that such vessels are ever visited."

An attempt appears here to be made to distinguish between a right to *visit* and a right to *search*. Now we have no hesitation in affirming that this distinction has no foundation whatever in the maritime law of nations, and the usage of the admiralty courts of any country. The "right of visitation and search" is the appropriate technical term always used by British civilians to express the belligerent right—a term which has a known sense and value, and is the exact equivalent of the term *droit de visite* used by the continental jurists. We repeat, that if the visitation is not accompanied by search, it is an empty mockery, and a wanton interruption of the navigator's voyage. And in confirmation of this assertion, we may observe that in all the cases brought to the consideration of the British government, by Mr. Stevenson, in pursuance of the instructions of the American government, the visitation was accompanied with the most rigorous search of persons and papers, of vessel and cargo, followed, in some instances, by a protracted detention, and in others by a carrying into port for adjudication. We have here, then, a *practical* commentary upon the text of these official documents, which demonstrates that the right claimed is that of visitation *and* search. We may also observe, that the same remark, made by Mr. Adams, as to the concession of the right by compact, would apply to a submission to its exercise without compact; that is to say, that if the visitation be not carried out by search, it "would reduce the right itself to a power merely nominal," the submission to which "would serve rather to mark the sacrifice of a great and precious principle, than to attain the end for which it would be given up."<sup>a</sup>

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<sup>a</sup> Mr. Secretary Adams' Letter to Sir S. Canning, June 24, 1823.



But Lord Aberdeen goes on to observe in the above quoted passage of his note to Mr. Stevenson : Nor is it, *as American*, that such vessels are ever visited."

In answer to this suggestion, we would remark, that neither is the neutral vessel visited, in time of war, *as neutral* ; but she is ever visited, and captured, and detained, and carried in for adjudication, as being suspected to be an enemy, either literally such, or as having forfeited her neutral character by violating her neutral duties. Hence the formula of a sentence of condemnation in the prize court always declares the ship or goods condemned to be *enemy's property* ; and that, in all cases, whether the property really belongs to the enemy, or is assimilated to that of an enemy by the offence of carrying contraband, by breach of blockade, or other unneutral conduct, which is visited by the prize court with the penalty of confiscation. It is therefore very little satisfaction to the master or proprietor of an American vessel to be told that he is not *visited as an American*, if the visitation be actually followed by the most rigorous search, by protracted detention, and by sending into port for trial ; by all which his voyage may be broken up, his cargo may perish, and his crew fall victims to a pestilential climate. We are not now arguing from the abuse against the lawful use of an incontestable and well defined right ; although it appears from the documents before us that these supposed consequences are by no means imaginary. We shall, of course, be understood as only meaning to insist upon the consideration that it is perfectly indifferent to the American merchant and navigator, whether his voyage is interrupted because he is an American, and suspected of violating the laws of his own country, or because he is suspected of not being a *bona fide* American, and of violating the laws and treaties of other countries under a false garb. Supposing him to be engaged in an innocent commerce, all this is perfectly indifferent to him ; and even supposing him to be engaged in a trade prohibited by the laws of his own country, he has, as we maintain, a

perfect right to be exempt upon the high seas in time of peace, from visitation and search, and seizure and detention for trial, by foreign officers and foreign courts of justice. In order to establish the contrary doctrine, it will be necessary to show in support of it some treaty to which his own country is a contracting party, or some public law universally recognized as forming a part of the general international code. But no such treaty, and no such law, has, or can be shown to exist.

Lord Aberdeen subjoins to this assurance, that American vessels are not visited, in time of peace, *as American*, the startling assertion that "it has been the invariable practice of the British navy," and, as his lordship believes, "of all the navies in the world, to ascertain *by visit* the real nationality of merchant vessels on the high seas, if there be good reason to apprehend their illegal character."

We might ask in vain for the evidence of the existence, in point of *fact*, of this universal and invariable practice; but the necessity for this inquiry will be superseded, by showing that it has no sanction in *law*. And for this purpose, a reference to the so-often quoted judgment of Lord Stowell, in the case of the *Louis*, will be amply sufficient. In that judgment, that learned civilian unequivocally asserts, "that no authority can be found, which gives any right of *visitation or interruption* over the vessels and navigation of other states, on the high seas, except what the right of war gives to belligerents against neutrals." The assertion of Lord Stowell, that no such authority can be found, must be considered as conclusive against its existence.

But let us examine a little more closely the assertion of Lord Aberdeen. He does not state what is to be the consequence of the visitation, supposing that the suspicions excited, by whatever cause, are confirmed in the opinion of the boarding officer, by the examination which may ensue. Visitation is but means to an end, and unless accompanied by some examination of the papers, the crew, the vessel,

and the cargo, it would be (as before remarked) a mere idle ceremony, and wanton interruption of the navigator in the prosecution of his voyage, attended with greater probable injury to him, than possible advantage to the interests of maritime police. Nor is it stated what is the precise nature of the "illegal character," the suspicion of which is here assumed, as justifying the "invariable practice of all the navies in the world, to ascertain by visit the real nationality of merchant vessels met with on the high seas." Is it, we would ask, of such an illegal character as may be manifested by acts prohibited by the laws and treaties of the country to which the vessel belongs, or by the laws and treaties of the country to which the armed cruiser belongs, or finally by the general law of nations? To each of these suppositions very distinct considerations belong; but we will confine our observations to the last—that is to say, to the supposition that the vessel has been guilty of some offence against the law of nations, such as *piracy*, for example, by which, of course, we mean international piracy, and not merely that which is declared to be such by the municipal statutes of a particular country.

On this part of the subject we have fortunately the aid of the highest judicial authority, to confirm the conclusions of our own minds as to the legal principles which ought to be applied to it, in the judgment of the supreme court of the United States, in the case of the *Marianna Flora*, a Portuguese armed merchant vessel, bound on a voyage from Brazil to Lisbon, and captured in 1821, by a gallant officer of the American navy, then employed in cruising with a public ship of war of the United States, under the President's instructions, for slave traders and pirates. The capture was made, after an accidental combat between the two vessels, under mutual misapprehension, each supposing the other to be a pirate. The Portuguese vessel and cargo being sent into an American port for trial, under an act of congress passed in 1819, as having been guilty of a piratical aggression against the American cruiser, were restored

to the claimants by the consent of the captors. The question as to costs and damages was brought before the supreme federal court in 1826, which enlightened tribunal determined, that had the Portuguese vessel been really guilty of a piratical aggression, wantonly committed on the American cruiser, the act of congress would not only have warranted her capture, but confiscation ; and that *whatever responsibility might be incurred by the nation to foreign powers in executing such laws*, there could be no doubt that courts of justice were bound to administer and obey them. The court also repeated its former decision in the case of the *Antelope*, that the right of visitation and search of vessels, armed or unarmed, navigating the ocean, in time of peace, does not belong to the public ships of any nation. This right was strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It was true that it had been held in the courts of the United States, that American ships offending against their laws, and foreign ships, in like manner, offending within their jurisdiction, might afterwards be pursued and seized upon the ocean, and rightfully brought into their ports for adjudication. This, however, had never been supposed to draw after it any right of visitation and search. The party, in such cases, seized at his peril. If he established the forfeiture, he was justified ; if he failed, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possessed an entire equality. It was the common highway of all, appropriated to the use of all ; and no one could vindicate to himself a superior or exclusive prerogative there. Every ship sailed there with the unquestionable right of pursuing her own lawful business without interruption ; but, whatever might be that business, she was bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases was, *sic utere tuo, ut non alienum lædas*.

It had been argued that no ship has a right to approach

another at sea, and that every ship had a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she might appropriate so much of the ocean as she might deem necessary for her protection, and prevent any nearer approach.

This doctrine appeared to the court to be novel, and was not supported by any authority. It went to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon shot of their shores, in virtue of their general sovereignty. But the latter right was founded upon the principle of sovereign and permanent appropriation, and had never been successfully asserted beyond it. Every vessel undoubtedly had a right to the use of so much of the ocean as she occupied and as was essential to her own movements. Beyond this, no exclusive right had ever been recognized, and the court saw no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there was no reason why they might not approach any vessels descried at sea, for the purpose of ascertaining their real character. Such a right seemed indispensable for the fair and discreet exercise of their authority; and the use of it could not be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it was as clear that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She had a right to consult her own

safety, but at the same time she must take care not to violate the rights of others. She might use any precautions dictated by prudence or the fears of her officers, either as to delay, or the progress, or course of her voyage; but she was not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seemed to the court the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carried with it very different obligations and responsibilities from those which belonged to public war, and was not to be confounded with it.

It had also been argued that there was a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance out of cannon-shot, and to demean themselves in such a manner as not to endanger neutrals. The court stated that it might be a decisive answer to this argument, that here no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent entitled to search neutrals on the ocean. He did not approach or subdue the *Marianna Flora* in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

The court, applying these principles to the case in judgment, determined that the gallant officer before it, was not, under the circumstances, liable in costs and damages for seizing and bringing in the Portuguese vessel, which, by her own improper conduct had led him into the mistake he had committed.<sup>o</sup> But, after all, the captor was in this case (to use an expression of Lord Stowell) "saved as by fire;" and the extreme caution the court manifest, in limiting the right of public armed vessels cruising for pirates and slave

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<sup>o</sup> Wheaton's Reports, vol. xi. pp. 39-40. The *Marianna Flora*.

traders on the high seas, to the mere authority of approaching suspicious vessels for the purpose of ascertaining their real character, by any means short of actual visitation and search,—shows what would have been its opinion of the pretension now advanced by the British government, of a right to ascertain, by visitation and search, the national character of such vessels.

Lord Aberdeen proceeds, in his letter of the 13th October, 1841, to Mr. Stevenson, to state the particular nature and extent of the British claim of a right of *visitation*, as he insists upon calling it, on board vessels navigating the high seas in time of peace.

“In certain latitudes, and for a particular object, the vessels referred to are visited, *not as American*, but either as British vessels engaged in an unlawful traffic, and carrying the flag of the United States for a criminal purpose, or as belonging to states which have by treaty ceded to Great Britain the right of search, and which right it is attempted to defeat by fraudulently bearing the protecting flag of the Union; or, finally, they are visited as piratical outlaws, possessing no claim to any flag or nationality whatever.”

We may be excused for neglecting the qualification of the right thus claimed, by limiting it to certain latitudes and to a particular object, because, if the right exist, it may be extended at the pleasure of the power claiming it to both the great oceans which encircle the globe, and to any other object which it may hereafter suit the ever-craving appetite of dominion to embrace within its grasp. We will, therefore, only observe that here are three classes of cases enumerated, in which the right of visitation and search (for such we have shown it to be) may be exercised under the British claim. The first class is that of *British* vessels engaged in an unlawful traffic, and seeking to screen their offence under the American flag. The second consists of *vessels belonging to other states*, which have by treaty conceded to Great Britain the right of visitation and search, and which right is attempted to be defeated by fraudulently

bearing the protecting flag of the United States. The third comprises *piratical outlaws*, possessing no rightful claim to any flag or national character whatsoever.

The British secretary of state for foreign affairs asserts that none of these classes of vessels have any title to be exempted from the exercise of the right of visitation and search claimed by Great Britain. He adds, that if the visitation by a British cruiser "should lead to the proof of the American origin of the vessel, and that she was avowedly engaged in the slave trade, exhibiting to view the manacles, fetters, and other usual implements of torture, or had even a number of these unfortunate beings on board, no British officer could interfere any further." That is to say, if the vessel in question turns out, in the judgment of the British boarding officer, to be *bona fide American*, she must be released, although the proof be ever so clear that she was actually engaged in the slave trade.

But, we would respectfully ask, what if she proves, in the judgment of the boarding officer, resulting from an examination of her papers and other proofs, to fall within one of the above described classes of vessels—that is to say, to be a British vessel disguised under the mask of the American flag and papers; or to belong to some one of the states which have, by treaty, conceded to Great Britain the right of visitation and search; or, finally, to be what Lord Aberdeen calls a *piratical outlaw*? What further proceedings are to be had in either or all of these cases? There can, we conceive, be but one answer to this question—namely, that the vessel, thus visited and searched, must be carried into some port of some country, for trial before some court of justice. As before observed, the visitation would be a worse than idle ceremony, unless followed by search, and the search a wanton outrage unless the vessel were to be carried in for adjudication, in case she turned out, in the judgment of the boarding officer, not to be American, and at the same time to fall within some one of the categories above enumerated. Now, this is precisely what happens



in the exercise of the belligerent right of visitation and search, in time of war. If a vessel sailing under the neutral flag is boarded and examined by a belligerent armed and commissioned cruiser, and the result of the examination establishes her neutrality in the judgment of the boarding officer, or his superior commander, she is of course released, and suffered to pursue her voyage. But if, on the other hand, their *prima facie* judgment be, that the ship or cargo is in reality enemy's property, or that the latter is contraband of war, or that the proprietor or master have been guilty of some unneutral act, by which the property is rendered liable to confiscation, the vessel is, of course, detained, and sent in for trial in the competent prize court of the captor's country. The identity of the right, now for the first time claimed by Great Britain, with the belligerent right of visitation and search, which Lord Stowell asserts, and Lord Aberdeen admits, cannot exist in time of peace, thus becomes more and more evident at every step we advance in the progress of our investigation.

We repeat, if the seizure had been made in time of war, the captured vessel must be carried into port for adjudication before the competent prize court of the captor's country. But it being made in time of peace, the captured vessel, if belonging to the first of the classes above mentioned, and seized and proceeded against as a British vessel engaged in violating the municipal laws of Great Britain, must necessarily be tried before the court of her own supposed country. But what if she proves on trial, to be an American, though guilty of slave trading?—and what, if she turns out to be both American, and innocent of all offence? If there should have been, in the opinion of the court by which the vessel is tried, such reasonable grounds of suspicion as constitute probable cause of seizure, the owners would not, according to the usual course of the admiralty, even be entitled to costs and damages for the detention, which, in most cases, must be attended with the loss of the voyage. The discretion of that court is exer-

cised in giving or refusing costs and damages, in cases of marine torts, with such arbitrary latitude, and is formed by such merely equitable, and even politic considerations, that it would be a very unsafe reliance for a foreign claimant to look to for adequate indemnity in case of wrongful seizure. In short, it would be easy to show the multiplied embarrassments that must inevitably arise from this anomalous attempt to execute the laws of a particular state beyond its own territorial jurisdiction on the high seas, in time of peace, upon vessels suspected to be its own, and to have fraudulently assumed the flag and papers of another nation. In time of war, such vessels may be seized and proceeded against in the exercise of a right incident to that of belligerent capture. Being once brought before the prize court, such vessels might be condemned on the ground that a British subject has no *persona standi in judicio* to claim property taken in the act of violating the municipal laws of his own country, whilst the claim of the American citizen would be at once rejected as founded in fraud and supported by falsehood. It is plain that the condemnation in the court of admiralty cannot proceed upon such grounds in time of peace. Doubtless, the laws of trade and navigation of any particular country may be executed by the seizure of the vessels proved to belong to that country, in a place which is not within the territory of a particular state, such as the high seas. But such seizure must necessarily be made at the hazard of mistaking the property of the citizens of another nation for that of the subjects of the state under whose authority the seizure is made. The right, then, claimed by Great Britain, so far as respects the first class of cases enumerated by Lord Aberdeen, comes to this :—that it is a right to seize at the peril of the captors, subject to full compensation in costs and damages, in case the property turns out to be American as claimed, and there be not such reasonable grounds of suspicion as constitutes what is technically called *probable cause* of seizure. There being no treaty and no public law applicable to the case,

against whom can the costs and damages be decreed by which the injured party is to be indemnified? Who is to pay them, the captor or his government? Under the special compacts entered into between Great Britain and other powers, the jurisdiction to try is conferred upon the tribunal of that nation to whom the vessel appears, *prima facie*, by the flag under which she sails, and *by the flag alone*, to belong; and the costs and damages which may be allowed by such tribunals, in case of wrongful seizure, are to be paid by the government of the captors.<sup>p</sup>

If, on the other hand, the seizure be of a vessel appertaining to the second class, that of vessels supposed to belong to states which have, by treaty, conceded to Great Britain the right of visitation and search, the trial must be had before the court of the country to which the vessel is supposed to belong, or before a mixed commission, as the one or the other tribunal may have been provided by the compact. But how can either of these tribunals acquire jurisdiction over the vessels of a nation which is no party to the treaty? In one of the cases mentioned in Mr. Stevenson's correspondence, that of the *Jago*, sailing under the American flag and papers, the vessel was sent into the British port of Sierra Leone for trial before the British and Spanish mixed commission at that place, which very properly refused to take jurisdiction of the case. But suppose a vessel, suspected to have fraudulently assumed the American flag and papers, to be sent in for adjudication before the court of the country to which she is believed in fact to belong, under the treaties of 1831 and 1833, between Great Britain and France, or under the quintuple treaty of the 20th December last; and suppose she proves, on trial, to be *bona fide* American, against whom are the costs and damages to be decreed, supposing the seizure not to be

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<sup>p</sup> Convention of the 22d March, 1833, between France and Great Britain, Articles 1-7. (Martens Nouveau Recueil, tom. ix. pp. 550-553.)

justified on the ground of probable cause? Not against the British captor, for the court has no jurisdiction over him, except in the case of seizure of a vessel belonging to the nations who are parties to the treaties—not against his government, for the United States are no parties to the treaties; and one of their citizens can claim no rights under the treaties.

It thus appears that, in the cases supposed of an attempt to execute the treaties against the vessels of a nation, which is no party to the compact, that such nation is placed in a much worse situation than if it had actually acceded to its stipulations. Instead of remaining under the tutelary protection of the preëxisting law of nations, which exempts its vessels on the high seas from the jurisdiction of every other nation, and from all search and detention in time of peace, it is involuntarily exposed to the exercise of the right of search, in the same manner, and to the same extent, with those states who have conceded the right by treaty; and *that*, without those securities against the but too probable abuse of the right which are provided by the compact to which it is no party. The British claim, then, is, in effect, a claim to do that independent of the compact, towards those who are no parties to the compact, which the compact, for the first time, authorized to be done towards any independent nation whatsoever. To justify such pretension, no arguments drawn from mere considerations of convenience, expediency, or even necessity, can avail to supply the intrinsic legal defects of the pretension itself. Even if it were ever so clearly proved, that the African slave trade could be effectually suppressed by the concession of the right of search on the part of all nations; which is so far from being proved, that the direct contrary is conclusively demonstrated by fact and experience according to the opinion of one of the most distinguished enemies of the traffic; it would not follow that even so great a good can lawfully be accomplished, by acting towards any one nation, even the smallest and the weakest, as if it had freely made the

concession. Considerations of higher convenience, expediency, and necessity, connected with settled views of policy as to national honour, and rights and interests, stand in the way, in the opinion of at least one great maritime nation, of its accomplishment by the means proposed. The words of Lord Stowell before quoted, here apply with all their force of energetic expression and intrinsic wisdom : "No nation has a right to force its way to the liberation of Africa, by trampling on the independence of other states ; or to procure an eminent good, by means that are unlawful ; or to press forward to a great principle, by breaking through other great principles that stand in the way."

As to the third class of vessels supposed by Lord Aberdeen to be justly liable to visitation and search on the high seas in time of peace, that of "piratical outlaws possessing no claim to any flag or nationality whatever," we would merely observe that, if by the term *piratical outlaws* be meant those who are guilty of piracy under the law of nations, the judgment of that enlightened tribunal, the supreme court of the United States, in the case of the *Marianna Flora*, above quoted, is amply sufficient to dispose of that class of cases, and to show that the piratical character of vessels navigating the ocean must be ascertained by means other than the exercise of the ordinary right of visitation and search. In fact, the character of pirates, properly so called, is seldom difficult to be determined. These enemies of the human race do not wait to be visited, but either fly from pursuit, or commence a piratical aggression against those who would approach for the purpose of ascertaining their real character. The present maritime police is amply sufficient to protect the peaceful navigator against sea rovers ; and there is, in truth, no more reason for admitting the exercise of a general right of visitation and search, in order to discover, arrest, and punish pirates, than there is to require all travellers to be examined and searched ; because there are occasionally some highway robberies committed in every civilized country. The of-

fence of piracy is in fact, at present, extremely rare on every sea ; and the United States have found no difficulty in effectually putting it down in the American seas, without asserting an indiscriminate right of search ; they do not claim it for themselves, for any purpose, and they will not acknowledge it in others.

But if by "piratical outlaws" be meant persons engaged in the slave trade, which, though formerly tolerated, and even encouraged by every nation, is now forbidden by the municipal laws of all civilized and Christian countries, and is declared to be piracy, and as such visited with capital punishment by the laws of some states ; we would remark, that it does not therefore follow that the offence of trading in slaves is deemed piracy under the law of nations, and as such punishable in the courts of any country into which the offenders may be brought. The attempt to introduce a new public law, making the offence piracy, under the law of nations, failed at the congress of Verona ; it failed in the negotiations of 1823-4, between the American and British governments, although the former was extremely anxious to make it the basis of a general concert among the states of Europe and America ; it failed in the more recent negotiations between the five great European powers, which finally resulted in the treaty of the 20th December, 1841. It is, therefore, a looseness of language, fatal to all accurate reasoning, to call slave traders "piratical outlaws," and to assert that, for the sake of discovering and punishing these persons as offenders against the law of nations, a general right of search is to be assumed in time of peace, as if cruising against slave traders were to be put on the same footing with public war between sovereign communities.

It is quite clear that such a right can never be established but by the voluntary consent of all civilized states. The equality of nations, in the eye of that public law by which the great community of Christendom is held together, forbids the idea of any, even the smallest and weakest state,

being coerced to consent to the establishment of a new rule of international conduct. The supposition, that the great powers of Europe intended, in the quintuple treaty, conceding the mutual right of search, to bring to bear upon America the moral weight of this holy alliance against the traffic in human beings, in order to compel her to sacrifice her maritime rights to this object, is, therefore, wholly gratuitous and inadmissible ; and if there be any of the contracting parties who had such a design in view in procuring the assent of others to the compact, they are probably, by this time, convinced that the attempt will be vain. The United States adopted the European law of nations when they separated from the British empire. But it was the international law of Europe, as it stood on the footing of immemorial usage and approved practice, and recognized by public jurists of authority, at the time when the United States declared their independence of Great Britain. To borrow the language of the President's message to congress at the opening of the session of 1841-2 :—

“ However desirous the United States may be for the suppression of the slave trade, they cannot consent to interpolations in the maritime code at the mere will and pleasure of other governments. We deny the right of any such interpolation to any one, or all the nations of the earth, without our consent. We claim to have a voice in all amendments or alterations of that code ; and when we are given to understand, as in this instance, by a foreign government, that its treaties with other nations cannot be executed without the establishment and enforcement of new principles of maritime police, to be employed without our consent, we must employ a language neither of equivocal import nor susceptible of misconstruction. American citizens prosecuting a lawful commerce in the African seas, under the flag of their country, are not responsible for the abuse or unlawful use of that flag by others ; nor can they rightfully, on account of any such alleged abuses, be inter-

rupted or detained on the ocean ; and if thus molested or detained, whilst pursuing honest voyages, in the usual way, and violating no law themselves, they are unquestionably entitled to indemnity."

Though the United States do not consider themselves bound by innovations, made, or attempted to be made, without their consent, in the maritime law of nations, since they became an independent power, they do not the less desire to see substantial improvements effected in that code by the general assent of all civilized states. Pacific and commercial from inclination and habit, the American people wish to see the same rules applied to hostilities by sea which have so long contributed to mitigate the ferocity of war by land. For this purpose they have ever sought, in their treaties of navigation and commerce with other nations, to abolish the usage of seizing and confiscating enemy's property in the ships of a friend—that relic of a barbarous age, when maritime warfare was identified with piracy ; and by which usage the peaceful intercourse of commercial nations with those who continue to be their friends, though involved in war with others, is still interrupted, in the midst of the general efforts of a more enlightened period to adopt a milder system of international relations. Influenced by these considerations, the United States, in the first commercial treaty they formed with any foreign power, that with France, of the 6th February, 1778, recognized the principle of free navigation in time of war, by adopting the maxim—*free ships, free goods* ; which had been incorporated into the conventional law of Europe, ever since the peace of Utrecht, 1713, though seldom or never observed in practice towards neutrals by any of its maritime states, when actually engaged in hostilities with each other. France, soon after, became involved in the war between Great Britain and her revolted colonies ; and the French government issued, on the 26th July, 1778, an ordinance extending the stipulations of the treaty of the 6th



February to all neutral states. The cause of American independence, and of the free navigation of the seas, thus became blended together, and was supported by the joint efforts of France, Holland, and Spain, sustaining the late British colonies in their struggle for emancipation. The armed neutrality of 1780 was formed by the neutral powers of the Baltic for the purpose of more accurately defining the rights of free navigation, and its principles were acknowledged by all the maritime states of Europe. The American congress recognized these principles by its ordinance of 1781, for the direction of the American cruisers and courts of prize. The war of the American Revolution was at last terminated by the treaty of peace signed at Versailles in 1783, by which the independence of the United States was acknowledged by Great Britain, and the treaties of Utrecht, by which the freedom of neutral navigation was stipulated, were renewed and confirmed between Great Britain, France, and Spain. In 1785, the United States concluded a treaty of commerce and navigation with Prussia, in which not only the same liberal principles of the maritime law of nations were recognized, but other stipulations intended to mitigate the evils of war by land and by sea, were inserted by the American negotiator, Franklin, who carried into diplomacy the enlightened spirit of the philosopher and philanthropist. On the breaking out of the war of the French Revolution in 1792-3, in which nearly all the powers of Europe became involved, the United States sought in vain to preserve those privileges of neutral commerce and navigation which had been guaranteed by solemn treaties with the maritime states of the European continent. Great Britain would not acknowledge them in theory or in practice; and those very powers which stipulated to respect them, *remembered to forget* their own professions and promises, in their anxiety to crush a dangerous and formidable enemy, who "attempted to propagate first her principles, and afterwards her dominion, by

the sword."<sup>1</sup> Hence the mutual interdictions of neutral trade with each other, in corn and provisions, published by the different belligerent powers ; hence the revival by Great Britain of the rule of the war of 1756, interdicting all neutral commerce with the colonies of an enemy ; hence that foul brood of paper blockades, and orders in council, and imperial decrees, by which European warfare was brought back again to the barbarous practices of the darkest age, and by which series of innovations and interpolations into the public code of nations, all neutral commerce was ultimately prohibited, and America, the only remaining neutral nation, was herself reluctantly compelled to take part in the war. During all this period, the right of visitation and search continued to be asserted by Great Britain, not only for its original purpose of seizing enemy's property on board neutral vessels, and for executing these barbarous edicts, but, in the case of the United States, by impressing from under their flag those seamen whom the British officers, in the exercise of an arbitrary discretion, chose to denominate British subjects. Had the practice of impressment, thus exercised as an incident to the belligerent right of visitation and search, been in fact applied to *British* seamen only, the American government might have longer forborne to resist the application of a principle against which it had never ceased to protest. But when to the other violations of its maritime rights, was superadded the application of the right of search to the impressment of *American* citizens, thousands of whom were detained and compelled to fight the battles of Great Britain against nations with whom their own country was at peace, the American government could no longer hesitate to draw the sword in order to vindicate the honour of its national flag. Hence its invincible repugnance to recognize by express

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<sup>1</sup> Mr. Canning's despatch to Sir C. Stuart, 26th January, 1823. (British Annual Register, vol. lxx. *Public Documents*, p. 141.)

compacts, to any extent or for any purpose, a right, which, whether applied to **MERCHANDIZE** or **MEN**, is so capable of being abused by a gigantic naval power. It is one thing to admit the right of visitation and search, as applied in time of war for its original, legitimate objects, recognized by usage and by the positive, if not by the natural law of nations ; and it is another and very different thing, to consent to extend that right to a state of peace, and to objects foreign to those for which it was originally established. The United States have never pretended that Great Britain could lawfully be compelled by force to abandon the belligerent right of visitation and search, however anxious they may have been to establish by general compact the maxim, of *free ships, free goods*, by which the exercise of the right would be limited to the cases of contraband and blockade only. On the other hand, it cannot be pretended that the United States may be compelled by force, or by that moral duress which is equivalent to the application of force, to abandon the immunity of their flag from the exercise of that right in time of peace. Their conclusive objection to its extension by special compact, in peace or in war, in any form, and under any restrictions, which have heretofore been proposed, is not merely that it may be liable to abuse, as experience has but too well proved ; but that such express recognition might involve by implication the establishment of maxims relating to neutral navigation, the reverse of those which they have ever sought to incorporate into the international code by the general concurrence of maritime states. "The encroaching character of the right, founded in its original nature as an irresponsible exercise of force," with its tendency to grow and gather strength by exercise, render it the more necessary, in their opinion, to be cautious in furnishing fresh precedents of its extension to new objects, and to a larger sphere of operation.

On the 20th December, 1841, a treaty was signed at London between the five great European powers, Austria, France, Great Britain, Prussia, and Russia, containing stipu-

lations for the more effectual suppression of the African slave trade, similar to those contained in the treaties of 1831 and 1833 between France and Great Britain, and declaring that the space within which the mutual right of search might be exercised for that purpose should be bounded on the north by the thirty-second parallel of north latitude; on the west by the eastern coast of America, from the point where the thirty-second point of north latitude strikes that coast, down to the forty-fifth parallel of south latitude, from the point where that parallel strikes the eastern coast of America to the eightieth degree of longitude, from the point where it is intersected by the forty-fifth parallel of south latitude up to the coast of India.

This treaty was subsequently ratified by all the contracting parties except France, which still remains bound by the conventions of 1831 and 1833, by which the reciprocal right of search is restricted to narrower geographical limits, and to the principle of which nearly all the other maritime states of Europe have acceded.

On the same day on which the quintuple treaty was signed in London, Lord Aberdeen addressed a note to Mr. Everett, minister of the United States at that court, in which the nature of the right claimed by Great Britain, independent of compact, and the manner in which it was intended to be exercised, were explained by stating that the British government renounced any right on their part to search American vessels in time of peace.

“The right of search, except when specially conceded by treaty, is a purely belligerent right, and can have no existence on the high seas during peace. The undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but also extends to the object of the voyage and the nature of the cargo. The sole purpose of the British cruisers is, to ascertain whether the vessels they meet with are really American or not. The right asserted has in truth no resemblance to the right of search, either in principle or in

practice. It is simply a right to satisfy the party, who has a legitimate interest in knowing the truth, that the vessel actually is, what her colours announce. This right we concede as freely as we exercise. The British cruisers are not instructed to detain American vessels, under any circumstances whatever ; on the contrary, they are ordered to abstain from all interference with them, be they slavers or otherwise. But where reasonable suspicion exists that the American flag has been abused for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protestations of their representative, that the government of the United States, which has stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth.

“It is not the intention of the undersigned at present to advocate the justice and propriety of the mutual right of search, as conceded and regulated by treaty ; or to weigh the reasons on account of which this proposal has been rejected by the government of the United States. He took occasion in a former note to observe, that concessions sanctioned by Great Britain and France, were not likely to be incompatible with the dignity and independence of any other state which should be disposed to follow their example. But the undersigned begs now to inform Mr. Everett, that he has this day concluded a joint treaty with France, Austria, Russia, and Prussia, by which the mutual right of search within certain latitudes is fully and effectually established for ever. This is in truth a holy alliance, in which the undersigned would have rejoiced to see the United States assume their proper place among the great powers of Christendom, foremost in power, wealth, and civilization, and connected together in the cause of mercy and justice.

“It is undoubtedly true that this right may be abused, like every other which is delegated to many and different hands. It is possible that it may be exercised wantonly and vexatiously ; and should this be the case, it would not

only call for remonstrance, but would justify resentment. This, however, is in the highest degree improbable ; and if in spite of the utmost caution, an error should be committed, and any American vessel should suffer loss or injury it would be followed by prompt and ample reparation. The undersigned begs to repeat that with American vessels, whatever be their destination, British cruisers have no pretension in any manner to interfere. Such vessels must be permitted, if engaged in it, to enjoy a monopoly of this unhallowed trade ; but the British government will never endure that the fraudulent use of the American flag shall extend the iniquity to other nations, by whom it is abhorred, and who have entered into solemn treaties with this country for its entire suppression."

Most of the observations already made upon the letter of Lord Aberdeen to Mr. Stevenson of the 13th October, 1841, will be found to apply equally to the above extracts. The distinction is still insisted on between the right of *search*, such as exists between belligerent nations in time of war, and the right of *visitation*, which the British government contends may be exercised in time of peace on the high seas by the public armed vessels of all nations, independent of special compact, for the purpose of detecting pirates and vessels concerned in the African slave trade. The right as above defined in respect to the slave trade is limited to such an examination as may be necessary for the purpose of ascertaining whether the suspected vessel belong to British subjects, or to the subjects of one of those powers which have stipulated with Great Britain the mutual exercise of the right of *search*, and is actually concerned in the slave trade. If the result of the examination shows that the vessel does not truly belong to one of the nations who are parties to that compact, then she is to be no further detained, even if it appears manifest that she is guilty of participating in the odious traffic. But we are not told what is to be done if the suspected vessel turns out, in the judgment of the boarding officer or his commander, to be a British ves-

sel, or that of one of the nations who have become parties to the holy alliance against the slave trade, and at the same time to be actually engaged in the same. It is quite clear, however, that in the latter case the vessel must be sent in for trial before some judicial tribunal. The only question is, what tribunal? In the case of an ordinary belligerent capture in time of war, the law of nations has provided that the vessel seized shall be sent in for adjudication before the court of admiralty of the captor's country; subject, of course, to the responsibility of his government to that of the claimant in case of an unjust seizure or condemnation. In the case of a seizure in time of peace the law of nations is totally silent on the subject, because it does not recognize a right to seize the vessels of another nation on the high seas in time of peace. If therefore the vessel in question turns out to be American, the seizure becomes an unlawful trespass *ab initio*, and the government of the captor becomes responsible to the claimant's government for all the consequences. But this is exactly what happens in the case of a belligerent seizure in time of war, and therefore it is that we have contended that it was impossible to distinguish the right claimed by Great Britain from the ordinary belligerent right of visitation and search. In the one case, as to a vessel pretending to be neutral, and which turns out to be really so, the question is, was there such probable cause to suspect that she was an enemy's vessel, or laden with enemy's property, or contraband of war, as would justify the seizure? In the other, the question is, was there probable cause to suspect that the vessel belonged to one of the nations contracting parties to the treaties stipulating the mutual right of search, and that she was actually engaged in the slave trade?

The right asserted, then, comes to this, a right to seize and send in for adjudication, subject to the payment of costs and damages in case of a seizure without reasonable cause of suspicion.

We again repeat that it is impossible to show a single

passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right, on the high seas, in time of peace independent of special compact. The right of seizure for a breach of the revenue laws, or laws of trade and navigation of a particular country, is quite different. The utmost length to which the exercise of this right on the high seas has ever been carried, in respect to the vessels of another nation, has been to justify seizing them within the territorial jurisdiction of the state against whose laws they offend, and pursuing them in case of flight beyond that limit, arresting them on the ocean, and bringing them in for adjudication before the tribunals of that state. "This, however," suggests the supreme court of the United States, in the case before quoted of the *Marianna Flora*, "has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified."

It is evident that no extension of this right by treaty between particular powers can affect other nations not parties to such treaty.

The negotiation which had been for some time carried on in London respecting this subject were subsequently transferred to Washington, by the appointment of Lord Ashburton as a special minister on the part of the British government, with authority to treat and definitively settle all matters in difference between the two countries. Lord Ashburton's mission resulted in the conclusion of a treaty between the United States and Great Britain, signed by him and Mr. Webster, secretary of state, at Washington on the 9th of August, 1842, which after referring to the 10th article of the treaty of Ghent relating to the slave trade, declared, (art. 8,) that : "Whereas, notwithstanding the laws which have at various times been passed by the two governments, that criminal traffic is still prosecuted and carried on ; and whereas the United States of America

§ 34. Treaty of Washington between the United States and Great Britain 1842.



and her majesty the Queen of the United Kingdom of Great Britain and Ireland are determined, that, so far as it may be in their power, it shall be effectually abolished : the parties mutually stipulate that each shall prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce separately and respectively, the laws, rights, and obligations of each of the two countries for the suppression of the slave trade ; the said squadrons to be independent of each other, but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces, as shall enable them most effectually to act in concert and coöperation, upon mutual consultation as exigencies may arise, for the attainment of the true object of this article ; copies of all such orders to be communicated by each government respectively."

The 9th article of the treaty of Washington also provides that : "Whereas, notwithstanding all efforts which may be made on the coast of Africa for suppressing the slave trade, the facilities for carrying on that traffic and avoiding the vigilance of cruisers by the fraudulent use of flags and other means, are so great, and the temptations for pursuing it, while a market can be found for slaves, so strong, as that the desired result may be long delayed, unless all markets be shut against the purchase of African negroes, the parties to this treaty agree that they will unite in all becoming remonstrances with any, and all powers, within whose dominions such markets are allowed to exist ; and that they will urge upon all such powers the propriety and duty of closing such markets forever."

The above stipulations were explained by the President of the United States, in his message communicating the treaty to the senate for its advice and consent to its ratification as follows :

"In my message at the commencement of the present

session of congress, I endeavoured to state the principles which this government supports respecting the right of search and the immunity of flags. Desirous of maintaining those principles fully, at the same time that existing obligations should be fulfilled, I have thought it most consistent with the dignity and honour of the country that it should execute its own laws and perform its own obligations by its own means and its own power. The examination or visitation of the merchant vessels of one nation by the cruisers of another for any purposes except those known and acknowledged by the law of nations, under whatever restraints or regulations it may take place, may lead to dangerous results. It is far better by other means to supersede any supposed necessity, or any motive, for such examination or visit. Interference with a merchant vessel by an armed cruiser is always a delicate proceeding—apt to touch the point of national honour, as well as to affect the interests of individuals. It has been thought, therefore, expedient, not only in accordance with the stipulations of the treaty of Ghent, but at the same time as removing all pretext on the part of others for violating the immunities of the American flag upon the seas, as they exist and are defined by the law of nations, to enter into the articles now submitted to the senate.

“The treaty which I now submit to you proposes no alteration, mitigation, or modification of the rules of the law of nations. It provides simply that each of the two governments shall maintain on the coast of Africa a sufficient squadron to enforce, separately and respectively, the laws, rights, and obligations of the two countries for the suppression of the slave trade.”

The motives which guided the policy of the American government on this occasion are also fully stated in a despatch from Mr. Webster to General Cass, minister of the United States in Paris, dated the 29th of August, 1842, of which the following is an extract :

“In communicating to you this treaty, I am directed by

the President to draw your particular attention to those articles which relate to the suppression of the African slave trade.

“After full and anxious consideration of this very delicate subject, the government of the United States has come to the conclusion which you will see expressed in the President’s message to the senate accompanying the treaty.

“Without intending or desiring to influence the policy of other governments on this important subject, this government has reflected on what was due to its own character and position as the leading maritime power on the American continent, left free to make such choice of means for the fulfilment of its duties as it should deem best suited to its dignity. The result of these reflections has been, that it does not concur in measures, which, for whatever benevolent purpose they may be adopted, or with whatever care and moderation they may be exercised, have yet a tendency to place the police of the seas in the hands of a single power. It chooses rather to follow its own laws, with its own sanction, and to carry them into execution by its own authority.

“Disposed to act in the spirit of the most cordial concurrence with other nations for the suppression of the African slave trade, that great reproach of our times, it deems it to be right, nevertheless, that this action, though concurrent, should be independent ; and it believes that from this independence it will derive a greater degree of efficiency.

“You will perceive, however, that, in the opinion of this government, cruising against slave dealers on the coast of Africa is not all which is necessary to be done, in order to put an end to the traffic. There are markets for slaves, or the unhappy natives of Africa would not be seized, chained, and carried over the ocean into slavery. These markets ought to be shut. And in the treaty now communicated to you, the high contracting parties have stipulated ‘that they will unite in all becoming representations and remonstrances with any and all powers within whose dominions

such markets are allowed to exist; and that they will urge upon all such powers the propriety and duty of closing such markets effectually at once and forever.'

"You are furnished, then, with the American policy in regard to this interesting subject. First, independent, but cordially concurrent efforts of maritime states, to suppress, as far as possible, the trade on the coast by means of competent and well appointed squadrons, to watch the shores and scour the neighbouring seas; secondly, concurrent becoming remonstrance with all governments who tolerate within their territories markets for the purchase of African negroes. There is much reason to believe that, if other states, professing equal hostility to this nefarious traffic, would give their own powerful concurrence and coöperation to these remonstrances, the general effect would be satisfactory, and that the cupidity and crimes of individuals would at length cease to find both their temptation and their reward in the bosom of Christian states, and in the permission of Christian governments.

"It will still remain for each government to revise, execute, and make more effectual its own municipal laws against its subjects or citizens who shall be concerned in, or in any way give aid or countenance to others concerned in this traffic.

"You are at liberty to make the contents of this despatch known to the French government."

Such was the sense in which the above stipulations of the treaty of Washington were understood by the American government, but as an apparent difference of opinion between the two governments subsequently occurred, it is deemed necessary to insert the following documents as essential to its elucidation.

"Department of State, Washington, February, 1843.

"The secretary of state, to whom has been referred a resolution of the house of representatives of the 22d instant, requesting that the President of the United States 'be re-

quested to communicate to that house, if not in his opinion improper, whatever correspondence or communication may have been received from the British government respecting the President's construction of the late British treaty, concluded at Washington, as it concerns an alleged right to visit American vessels,' has the honor to report to the President that Mr. Fox, her Britannic majesty's envoy extraordinary and minister plenipotentiary, came to the department of state on the 24th instant and informed the secretary that he had received from Lord Aberdeen, her majesty's principal secretary of state for foreign affairs, a despatch, under date of the 18th of January, which he was directed to read to the secretary of state of the United States. The substance of the despatch was, that there was a statement in a paragraph of the President's message to congress, at the opening of the present session, of serious import, because, to persons unacquainted with the facts, it would tend to convey the supposition not only that the question of the right of search had been disavowed by the plenipotentiary at Washington, but that Great Britain had made concessions on that point.

"That the President knew that the right of search never formed the subject of discussion during the late negotiation, and that neither was any concession required by the United States government nor made by Great Britain.

"That the engagement entered into by the parties to the treaty of Washington for suppressing the African slave trade was unconditionally proposed and agreed to.

"That the British government saw in it an attempt, on the part of the government of the United States, to give a practical effect to their repeated declarations against that trade, and recognised with satisfaction an advance towards the humane and enlightened policy of all Christian states, from which they anticipated much good. That Great Britain would scrupulously fulfil the conditions of this engagement ; but that, from the principles which she has constantly asserted, and which are recorded in the correspondence be-

tween the ministers of the United States in England and herself, in 1841, England has not receded and would not recede. That he had no intention to renew, at present, the discussion upon the subject. That his last note was yet unanswered. That the President might be assured that Great Britain would always respect the just claims of the United States. That the British government made no pretension to interfere, in any manner whatever, either by detention, visit, or search, with vessels of the United States, known or believed to be such; but that it still maintained, and would exercise when necessary, its own right to ascertain the genuineness of any flag which a suspected vessel might bear; that if, in the exercise of this right, either from involuntary error or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded; but that it should entertain, for a single instant, the notion of abandoning the right itself, would be quite impossible.

“That these observations had been rendered necessary by the message to congress. That the President is undoubtedly at liberty to address that assembly in any terms which he may think proper; but if the Queen’s servant should not deem it expedient to advise her majesty also to advert to these topics in her speech from the throne, they desired, nevertheless, to hold themselves perfectly free, when questioned in parliament, to give all such explanations as they might feel to be consistent with their duty, and necessary for the elucidation of the truth.

“The paper having been read, and its contents understood, Mr. Fox was told, in reply, that the subject would be taken into consideration, and that a despatch relative to it would be sent, at an early day, to the American minister in London, who would have instructions to read it to her majesty’s principal secretary of state for foreign affairs.

DANIEL WEBSTER.

“To the President.”

“Department of State, Washington, March 28, 1843.

“Sir : I transmit to you with this despatch a message from the President of the United States to congress, communicated on the 27th of February, and accompanied by a report made from this department to the President, of the substance of a despatch from Lord Aberdeen to Mr. Fox, which was by him read to me on the 24th ultimo.

“Lord Aberdeen’s despatch, as you will perceive, was occasioned by a passage in the President’s message to congress at the opening of its late session. The particular passage is not stated by his lordship ; but no mistake will be committed, it is presumed, in considering it to be that which was quoted by Sir Robert Peel and other gentlemen in the debate in the house of commons on the answer to the Queen’s speech on the 3d of February.

“The President regrets that it should have become necessary to hold a diplomatic correspondence upon the subject of a communication from the head of the executive government to the legislature ; drawing after it, as in this case, the further necessity of referring to observations made by persons in high and responsible stations, in the debates of public bodies. Such a necessity, however, seems to be unavoidably incurred in consequence of Lord Aberdeen’s despatch, for although the President’s recent message may be regarded as a clear exposition of his opinions on the subject, yet a just respect for her majesty’s government, and a disposition to meet all questions with promptness, as well as with frankness and candor, require that a formal answer should be made to the despatch.

“The words in the message at the opening of the session which are complained of it is supposed, are the following :

““Although Lord Aberdeen, in his correspondence with the American envoys at London expressly disclaimed all right to detain an American ship on the high seas, even if found with a cargo of slaves on board, and restricted the British pretension to a mere claim to visit and inquire ; yet it could not well be discerned by the executive of the Uni-

ted States how such visit and inquiry could be made without detention on the voyage, and consequent interruption to the trade. It was regarded as the right of search presented only in a new form, and expressed in different words ; and I therefore felt it to be my duty distinctly to declare in my annual message to congress, that no such concession could be made, and that the United States had both the will and the ability to enforce their own laws, and to protect their flag from being used for purposes wholly forbidden by those laws, and obnoxious to the moral censure of the world.'

"This statement would tend, as Lord Aberdeen thinks, to convey the supposition not only that the question of the right of search had been disavowed by the British plenipotentiary at Washington, but that Great Britain had made concessions on that point.

"Lord Aberdeen is entirely correct in saying that the claim of a right of search was not discussed during the late negotiation, and that neither was any concession required by this government, nor made by that of her Britannic majesty.

"The 8th and 9th articles of the treaty of Washington constitute a mutual stipulation for concerted efforts to abolish the African slave trade. This stipulation, it may be admitted, has no other effects on the pretensions of either party than this : Great Britain had claimed as a right that which this government could not admit as a *right*, and, in the exercise of a just and proper spirit of amity, a mode was resorted to which might render unnecessary both the assertion and the denial of such claim.

"There probably are those who think that what Lord Aberdeen calls a right of visit, and which he attempts to distinguish from the right of search, ought to have been expressly acknowledged by the government of the United States, at the same time, there are those on the other side who think that the formal surrender of such a right of visit should have been demanded by the United States, as a precedent condition to the negotiation for treaty stipulations on



the subject of the African slave trade. But the treaty neither asserts the claim in terms, nor denies the claim in terms ; it neither formally insists upon it, nor formally renounces it. Still, the whole proceeding shows that the object of the stipulation was to avoid such differences and disputes as had already arisen, and the serious practical evils and inconveniences which, it cannot be denied, are always liable to result from the practice which Great Britain had asserted to be lawful. These evils and inconveniences had been acknowledged by both governments. They had been such as to cause much irritation, and to threaten to disturb the amicable sentiments which prevailed between them. Both governments were sincerely desirous of abolishing the slave trade ; both governments were equally desirous of avoiding occasion of complaint by their respective citizens and subjects ; and both governments regarded the 8th and 9th articles as effectual for their avowed purpose, and, likely, at the same time, to preserve all friendly relations, and to take away causes of future individual complaints. The treaty of Washington was intended to fulfil the obligations entered into by the treaty of Ghent. It stands by itself, is clear and intelligible. It speaks its own language, and manifests its own purpose. It needs no interpretation, and requires no comment. As a fact, as an important occurrence in national intercourse, it may have important bearings on existing questions respecting the public law ; and individuals, or perhaps governments, may not agree as to what these bearings really are. Great Britain has discussions, if not controversies, with other great European states upon the subject of visit or search. These states will naturally make their own commentary on the treaty of Washington, and draw their own inferences from the fact that such a treaty has been entered into. Its stipulations, in the mean time, are plain, explicit, satisfactory to both parties, and will be fulfilled on the part of the United States, and it is not doubted on the part of Great Britain also, with the utmost good faith.

"Holding this to be the true character of the treaty, I might perhaps excuse myself from entering into the consideration of the grounds of that claim of a right to visit merchant ships for certain purposes in time of peace, which Lord Aberdeen asserts for the British government, and declares that it can never surrender. But I deem it right, nevertheless, and no more than justly respectful towards the British government, not to leave the point without remark.

"In his recent message to congress, the President, referring to the language of Lord Aberdeen in his note to Mr. Everett of the 20th of December, 1841, and in his late despatch to Mr. Fox, says: 'These declarations may well lead us to doubt whether the apparent difference between the two governments is not rather one of definition than of principle.'

"Lord Aberdeen, in his note to you of the 20th of December, says :

" 'The undersigned again renounces, as he has already done in the most explicit terms, any right on the part of the British government to search American vessels in time of peace. The right of search, except when specially conceded by treaty, is a purely belligerent right, and can have no existence on the high seas during peace. The undersigned apprehends, however, that the right of search is not confined to the verification of nationality of the vessel, but also extends to the object of the voyage and the nature of the cargo. The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American or not. The right asserted has, in truth, no resemblance to the right of search, either in principle or practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth that the vessel actually is what her colors announce. This right we concede as freely as we exercise. The British cruisers are not instructed to detain American vessels under any circumstances whatever ; on the contrary, they are ordered to abstain from interference with them, be they slavers or other-

wise. But where reasonable suspicion exists that the American flag has been abused for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protestations of their representative, that the government of the United States, which has stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth.'

"And in his recent despatch to Mr. Fox, his lordship further says that—

" 'The President might be assured that Great Britain would always respect the just claims of the United States ; that the British government made no pretension to interfere in any manner whatever, either by detention, visit, or search, with vessels of the United States, known or believed to be such ; but that it still maintained, and would exercise when necessary, its own right to ascertain the genuineness of any flag which a suspected vessel might bear ; that if, in the exercise of this right, either from involuntary error, or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded ; but that it should entertain, for a single instant, the notion of abandoning the right itself, would be quite impossible.'

"This, then, is the British claim, as asserted by her majesty's government.

"In his remarks, in the speech already referred to, in the house of commons, the first minister of the crown said :

" 'There is nothing more distinct than the right of visit is from the right of search. Search is a belligerent right, and not to be exercised in time of peace, except when it has been conceded by treaty. The right of search extends not only to the vessel, but to the cargo also. The right of visit is quite distinct from this, though the two are often confounded. The right of search, with respect to American vessels, we entirely and utterly disclaim ; nay, more, if we knew that an American vessel were furnished with all the

materials requisite for the slave trade—if we knew that the decks were prepared to receive hundreds of human beings, within a space in which life is almost impossible, still we should be bound to let that American vessel pass on. But the right we claim is, to know whether a vessel pretending to be American, and hoisting the American flag, be *bona fide* American.’

“The President’s message is regarded as holding opinions in opposition to these.

“The British government then supposes that the right of visitation and the right of search are essentially distinct in their nature, and that this difference is well known and generally acknowledged; that the difference between them consists in their different objects and purposes: one, the visit, having for its object nothing but to ascertain the nationality of the vessel; the other, the search, being an inquisition, not only into the nationality of the vessel, but the nature and objects of her voyage, and the true ownership of her cargo.

“The government of the United States, on the other hand, maintains that there is no such well known and acknowledged, nor, indeed, any broad and genuine difference between what has been usually called visit, and what has been usually called search; that the right of visit, to be effectual, must come in the end to include search; and thus to exercise, in peace, an authority which the law of nations only allows in time of war.

“If such well known distinction exists, where are the proofs of it? What writers of authority on the public law, what adjudications in courts of admiralty, what public treaties recognize it? No such recognition has presented itself to the government of the United States; but, on the contrary, it understands that public writers, courts of law, and solemn treaties have, for two centuries, used the words ‘visit’ and ‘search’ in the same sense. What Great Britain and the United States mean by the ‘right of search,’ in its broadest sense, is called by the continental writers

and jurists by no other name than the "right of visit." Visit, therefore, as it has been understood, implies not only a right to inquire into the national character, but to detain the vessel, to stop the progress of the voyage, to examine papers, to decide on their regularity and authenticity, and to make inquisition on board for enemy's property, and into the business which the vessel is engaged in. In other words, it describes the entire right of belligerent visitation and search. Such a right is justly disclaimed by the British government in time of peace; they nevertheless insist on a right which they denominate a right of visit, and by that word describe the claim which they assert; therefore it is proper and due to the importance and delicacy of the questions involved, to take care that, in discussing them, both governments understand the terms which may be used in the same sense. If, indeed, it should be manifest that the difference between the parties is only verbal, it might be hoped that no harm would be done; but the government of the United States thinks itself not justly chargeable with excessive jealousy, or with too great scrupulosity in the use of words, in insisting on its opinion that there is no such distinction as the British government maintains, between visit and search; and that there is no right to visit in time of peace, except in the execution of revenue laws or other municipal regulations, in which cases the right is usually exercised near the coast, or within the marine league, or where the vessel is justly suspected of violating the law of nations by piratical aggression; but, wherever exercised, it is a right of search. Nor can the United States government agree that the term "right" is justly applied to such exercise of power as the British government thinks it indispensable to maintain in certain cases.

The right asserted is a right to ascertain whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which render her liable to the suspicion, first, that she is not entitled to the protection of the flag;

and, secondly, that if not entitled to it, she is, either by the law of England, as an English vessel, or under the provisions of treaties with certain European powers, subject to the supervision and search of British cruisers.

“And yet Lord Aberdeen says : ‘That if in the exercise of this right, either from involuntary error or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded.’

“It is not easy to perceive how these consequences can be admitted justly to flow from the fair exercise of a clear right. If injury be produced by the exercise of a right, it would seem strange that it should be repaired as if it had been the effect of a wrongful act. The general rule of law certainly is, that, in the proper and prudent exercise of his own rights, no one is answerable for undesigned injuries. It may be said that the right is a qualified right ; that is a right to do certain acts of force at the risk of turning out to be wrong doers, and of being made answerable for all damages. But such an argument would prove every trespass to be matter of right, subject only to just responsibility. If force were allowed such reasoning in other cases, it would follow that an individual’s right in his own property was hardly more than a well founded claim for compensation, if he should be deprived of it. But compensation is that which is rendered for injury, and is not commutation or forced equivalent for acknowledged rights. It implies at least, in its general interpretation, the commission of some wrongful act.

“But without pressing further these inquiries into the accuracy and propriety of definitions, and the use of words, I proceed to draw your attention to the thing itself, and to consider what these acts are which the British government insists its cruisers have a right to perform, and to what consequences they naturally and necessarily lead. An eminent member of the house of commons thus states the British claim, and his statement is acquiesced in and adopted by the first minister of the crown :

“ ‘The claim of this country is for the right of our cruisers to ascertain whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted—such vessel being in circumstances which render her liable to the suspicion, first, that she was not entitled to the protection of the flag ; and, secondly, if not entitled to it, she was, either under the law of nations or the provisions of treaties, subject to the supervision and control of our cruisers.’

“ Now the question is, *by what means* is this ascertainment to be effected ?

“ As we understand the general and settled rules of public law in respect to ships of war sailing under the authority of their government ‘to arrest pirates and other public offenders,’ there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right of approach seems indispensable for the fair and discreet exercise of their authority ; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear that no ship is, under such circumstances, bound to lie by or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. Her right to the free use of the ocean is as perfect as that of any other. An entire equality is presumed to exist. She has a right to consult her own safety ; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay or the progress or course of her voyage ; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers.

“ But, if the vessel thus approached attempts to avoid the vessel approaching, or does not comply with her commander’s order to send him her papers for his inspection,

nor consent to be visited, or detained, what is next to be done? Is force to be used, and if force be used, may that force be lawfully repelled? These questions lead at once to the elemental principle, the essence of the British claim. Suppose the merchant vessel be in truth an American vessel, engaged in lawful commerce, and that she does not choose to be detained. Suppose she resist the visit. What is the consequence? In those cases in which the belligerent right of visit exists, resistance to the exercise of that right is regarded as just cause of condemnation, both of vessel and cargo. Is that penalty, or what other penalty, to be incurred by resistance to visit in time of peace? Or suppose that force to be met by force, gun returned for gun, and the commander of the cruiser, or some of his seamen, be killed, what description of offence will have been committed? It would be said, in behalf of the commander of the cruiser, that he mistook the vessel for a vessel of England, Brazil, or Portugal, but does this mistake of his take away from the American vessel the right of self-defence? The writers of authority declare it to be a principle of natural law, that the privilege of self-defence exists against an assailant, who mistakes the object of his attack for another whom he had a right to assail.

“ Lord Aberdeen cannot fail to see, therefore, what serious consequences might ensue, if it were to be admitted that this claim to visit in time of peace, however limited or defined, should be permitted to exist as a strict matter of right; for, if it exist as a right, it must be followed by corresponding duties and obligations, and the failure to fulfil those duties would naturally draw penal consequences after it, till ere long it would become, in truth, little less, or little other, than the belligerent right of search.

“ If visit, or visitation, be not accompanied by search, it will be, in most cases, merely idle. A sight of papers may be demanded, and papers may be produced; but it is known that slave traders carry false papers and different sets of papers. A search for other papers then must be



made, where suspicion justifies it, or else the whole proceeding would be nugatory. In suspicious cases, the language and general appearance of the crew are among the means of ascertaining the national character of the vessel. The cargo on board, also, often indicates the country from which she comes. Her log-book, showing the previous course and events of her voyage, her internal fitment, and equipment, are all evidences for her, or against her, on her allegation of character. These matters, it is obvious, can only be ascertained by rigorous search.

“It may be asked—if a vessel may not be called on to show her papers, why does she carry papers? No doubt she may be called on to show her papers; but the question is, where, when, and by whom? Not in time of peace, on the high seas, where her rights are equal to the rights of any other vessel, and where none has a right to molest her. The use of her papers is, in time of war, to prove her neutrality, when visited by belligerent cruisers; and, in both peace and war, to show her national character, and the lawfulness of her voyage in those ports of other countries to which she may proceed for purposes of trade.

“It appears to the government of the United States that the view of this whole subject which is the most naturally taken, is also the most legal, and most in analogy with other cases. British cruisers have a right to detain British merchantmen for certain purposes; and they have a right, acquired by treaty, to detain merchant vessels of several other nations for the same purposes. But they have no right at all to detain an American merchant vessel. This, Lord Aberdeen admits in the fullest manner. Any detention of an American vessel by a British cruiser is therefore a wrong, a trespass, although it may be done under the belief that she was a British vessel, or that she belonged to a nation which had conceded the right of such detention to the British cruisers; and the trespass, therefore, an involuntary trespass. If a ship of war, in thick weather, or in the darkness of the night, fire upon and sink a neutral vessel

under the belief that she is an enemy's vessel, this is a trespass—a mere wrong, and cannot be said to be an act done under any right, accompanied by responsibility for damages. So, if a civil officer on land have process against one individual, and through mistake arrest another, this arrest is wholly tortious. No one would think of saying it was done under any lawful exercise of authority, subject only to responsibility, or that it was any thing but a mere trespass, though an unintentional trespass. The municipal law does not undertake to lay down beforehand any rule for the government of such cases ; and as little, in the opinion of the government of the United States, does the public law of the world lay down beforehand any rule for the government of cases of involuntary trespasses, detentions, and injuries at sea ; except that, in both classes of cases, law and reason make a distinction between injuries committed through mistake and injuries committed by design ; the former being entitled to fair and just compensation, the latter demanding exemplary damages, and sometimes personal punishment. The government of the United States has frequently made known its opinion, which it now repeats, that the practice of detaining American vessels, subject to just compensation, however guarded by instructions, or however cautiously exercised, necessarily leads to serious inconvenience and injury. The amount of loss cannot be always well ascertained. Compensation, if it be adequate in the amount, may still necessarily be long delayed ; and the pendency of such claims always proves troublesome to the governments of both countries. These detentions, too, frequently irritate individuals, cause warm blood, and produce nothing but ill effects on the amicable relations existing between the two countries. We wish, therefore, to put an end to them, and to avoid all occasion for their recurrence.

“On the whole, the government of the United States, while it has not conceded a mutual right of visit or search, as has been done by the parties to the quintuple treaty of Decem-

ber, 1841, does not admit that by the law and practice of nations there is any such thing as a right of visit, distinguished by well known rules and definitions from the right of search. It does not admit that visit of American merchant vessels by British cruisers is founded on any right, notwithstanding the cruiser may suppose such vessel to be British, Brazilian or Portuguese. It cannot but see that the detention and examination of American vessels by British cruisers, has already led to consequences, and it fears that, if continued, it would still lead to further consequences, highly injurious to the lawful commerce of the United States.

“At the same time, the government of the United States fully admits that its flag can give no immunity to pirates, nor to any other than to regularly documented American vessels ; and it was upon this view of the whole case, and with a firm conviction of the truth of these sentiments, that it cheerfully assumed the duties contained in the treaty of Washington in the hope that thereby causes of difficulty and of difference might be altogether removed, and that the two powers might be enabled to act concurrently, cordially, and effectually, for the suppression of a traffic which both regard as a reproach upon the civilization of the age, and at war with every principle of humanity and Christian sentiment.

“The government of the United States has no interest, nor is it under the influence of any opinions, which should lead it to desire any derogation of the just authority and rights of maritime powers. But in the convictions which it entertains, and in the measures which it has adopted, it has been governed solely by a sincere desire to support those principles and those practices which it believes to be conformable to public law, and favourable to the peace and harmony of nations.

“Both houses of congress, with a remarkable degree of unanimity, have made express provisions for carrying into effect the eighth article of the treaty. An American squa-

dron will immediately proceed to the coast of Africa. Instructions for its commander are in the course of preparation, and copies will be furnished to the British government, and the President confidently believes that the cordial concurrence of the two governments, in the mode agreed on, will be more effectual than any efforts yet made for the suppression of the slave trade.

"You will read this despatch to Lord Aberdeen, and, if he desire it, give him a copy.

"I am, sir, your obedient servant,

"DANIEL WEBSTER.

"Edward Everett, Esq. &c. &c. &c."

The preamble to the treaty of Washington recited that "whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up." The tenth article accordingly declared that, "It is agreed that the United States and her Britannic majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities respectively made, deliver up to justice all persons, who being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed: and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he

may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered ; and if on such hearing the evidence be deemed sufficient to maintain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

Besides this stipulation for the extradition of fugitives from justice, it was the desire of the American government that some more comprehensive provision should have been inserted in the treaty, applicable to the cases of vessels navigating the channel between the United States and the Bahama islands, and driven by stress of weather to seek an asylum in British ports. Lord Ashburton not having been authorized by his government to enter into a formal stipulation for this purpose, the following correspondence ensued between the two negotiators, which it is deemed necessary to insert on account of the importance of the principles asserted on one side, and of the assurances given on the other as to the practical rules to be hereafter observed in such cases..

*Mr. Webster to Lord Ashburton.*

" Department of State, Washington, August 1, 1842.

" My Lord : The President has learned with much regret that you are not empowered by your government to enter into a formal stipulation for the better security of vessels of the United States, when meeting with disasters in passing between the United States and the Bahama islands, and driven, by such disasters, into British ports. This is a subject which is deemed to be of great importance, and which can not, on the present occasion, be overlooked.

" Your lordship is aware that several cases have occurred with the last few years which have caused much complaint. In some of these cases compensation has been made by the English government for the interference of the local authorities with American vessels having slaves on board,

by which interference these slaves were set free. In other cases, such compensation has been refused. It appears to the President to be for the interest of both countries that the recurrence of similar cases in future should be prevented as far as possible.

"Your lordship has been acquainted with the case of the 'Creole,' a vessel carried into the port of Nassau last winter by persons who had risen upon the lawful authority of the vessel, and, in the accomplishment of their purpose, had committed murder on a person on board.

"The opinions which that occurrence gave occasion for this government to express, in regard to the rights and duties of friendly and civilized maritime states, placed by providence near to each other, were well considered, and are entertained with entire confidence. The facts in the particular case of the 'Creole' are controverted: positive and officious interference by the colonial authorities to set the slaves free being alleged on one side and denied on the other.

"It is not my present purpose to discuss this difference of opinion as to the evidence in the case, as it at present exists, because the rights of individuals having rendered necessary a more thorough and a judicial investigation of facts and circumstances attending the transaction, such investigation is understood to be now in progress, and its result, when known, will render me more able than at this moment to present to the British government a full and accurate view of the whole case. But it is my purpose, and my duty, to invite your lordship's attention to the general subject, and your serious consideration of some practical means of giving security to the coasting trade of the United States against unlawful annoyance and interruption along this part of their shore. The Bahama islands approach the coast of Florida within a few leagues, and, with the coast, form a long and narrow channel, filled with innumerable small islands and banks of sand, and the navigation is difficult and dangerous, not only on these accounts,

but from the violence of the winds and the variable nature of the currents. Accidents are of course frequent, and necessity often compels vessels of the United States, in attempting to double Cape Florida, to seek shelter, in the ports of these islands. Along this passage the Atlantic States hold intercourse with the states on the Gulf and the Mississippi, and through it the products of the valley of that river (a region of vast extent and boundless fertility) find a main outlet to the sea, in their destination to the markets of the world.

“No particular ground of complaint exists as to the treatment which American vessels usually receive in these ports, unless they happen to have slaves on board: but in cases of that kind, complaints have been made, as already stated, of officious interference of the colonial authorities with the vessel, for the purpose of changing the condition in which these persons are, by the laws of their own country, and of setting them free.

“In the southern states of this Union slavery exists by the laws of the states and under the guarantee of the constitution of the United States; and it has existed in them from a period long antecedent to the time when they ceased to be British colonies. In this state of things, it will happen that slaves will be often on board coasting vessels, as hands, as servants attending the families of their owners, or for the purpose of being carried from port to port. For the security of the rights of their citizens, when vessels, having persons of this description on board, are driven by stress of weather, or carried by unlawful force, into British ports, the United States propose the introduction of no new principle into the law of nations. They require only a faithful and exact observance of the injunctions of that code, as understood and practised in modern times.

“Your lordship observes that I have spoken only of American vessels driven into British ports by the disasters of the seas, or carried in by unlawful force. I confine my remarks to these cases, because they are the common

cases, and because they are the cases which the law of nations most emphatically exempts from interference. The maritime law is full of instances of the application of that great and practical rule, which declares that that which is the clear result of necessity ought to draw after it no penalty and no hazard. If a ship be driven, by stress of weather, into a prohibited port, or into an open port with prohibited articles on board, in neither case is any forfeiture incurred. And what may be considered a still stronger case, it has been decided by eminent English authority, and that decision has received general approbation, that if a vessel be driven, by necessity, into a port strictly blockaded, this necessity is good defence, and exempts her from penalty.

“A vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs, and subjected, exclusively, to the jurisdiction of that nation. If against the will of her master, or owner, she be driven or carried nearer to the land, or even into port, those who have, or who ought to have, control over her, struggling all the while to keep her upon the high seas, and so within the exclusive jurisdiction of her own government, what reason or justice is there in creating a distinction between her rights and immunities, in a position, thus the result of absolute necessity, and the same rights and immunities before superiour power had forced her out of her voluntary course?

“But, my lord, the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow even to a merchant vessel, coming into any open port of another country voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding to this extent, by consequence, the jurisdiction of the local law. A ship, say the publicists, though at anchor in a foreign harbor,



preserves its jurisdiction and its laws. It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels, even in parts of the sea subject to a foreign dominion.

"This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practices of modern nations.

"If a murder be committed on board of an American vessel, by one of the crew upon another, or upon a passenger, or by a passenger on one of the crew, or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States, in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same.

"It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbors, or wheresoever else they may be water borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the ex-

tent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.

"If a vessel be driven by weather into the ports of another nation, it would hardly be alleged by any one that, by the mere force of such arrival within the waters of the state, the law of that state would so attach to the vessel as to affect existing rights of property between persons on board, whether arising from contract or otherwise. The local law would not operate to make the goods of one man to become the goods of another man. Nor ought it to affect their personal obligations, or existing relations between themselves, nor was it ever supposed to have such effect, until the delicate and exciting question which has caused these interferences in the British islands arose. The local law in these cases dissolves no obligations or relations lawfully entered into or lawfully existing according to the laws of the ship's country. If it did, intercourse of civilized men between nation and nation must cease. Marriages are frequently celebrated in one country in a manner not lawful or valid in another; but did anybody ever doubt that, marriages are valid all over the civilized world, if valid in the country in which they took place? Did any one ever imagine that local law acted upon such marriages to annihilate their obligation, if the party should visit a country in which marriages must be celebrated in another form?

"It may be said, that, in such instances, personal relations are founded in contract, and therefore to be respected; but that the relation of master and slave is not founded in contract, and therefore is to be respected only by the law of the place which recognizes it. Whoever so reasons encounters the authority of the whole body of public law from Grotius down; because there are numerous instances in which the law itself presumes or implies contracts; and prominent among those instances is the very relation which we are now considering and which relation is holden by law to draw after it mutuality of obligation.

"Is not the relation between a father and his minor chil-

dren acknowledged, when they go abroad ? And on what contract is this founded, but a contract raised by general principles of law, from the relation of the parties ?

“ Your lordship will please to bear in mind that the proposition which I am endeavoring to support is, that by the comity of the law of nations, and the practice of modern times, merchant vessels entering open ports of other nations, for the purpose of trade, are presumed to be allowed to bring with them, and to retain, for their protection and government, the jurisdiction and laws of their own country. All this, I repeat, is presumed to be allowed ; because the ports are open, because trade is invited, and because, under these circumstances, such permission or allowance is according to general usage. It is not denied that all this may be refused ; and this suggests a distinction, the disregard of which may perhaps account for most of the difficulties arising in cases of this sort ; that is to say, the distinction between what a state may do, if it pleases, and what it is presumed to do, or not to do, in the absence of any positive declaration of its will. A state might declare that all foreign marriages should be regarded as null and void within its territory ; that a foreign father, arriving with an infant son, should no longer have authority or control over him ; that, on the arrival of a foreign vessel in its ports, all shipping articles and all indentures of apprenticeship between her crew and her owners or masters should cease to be binding. These, and many other things equally irrational and absurd, a sovereign state has doubtless the power to do ; but they are not to be presumed. It is not to be taken for granted, *ab ante*, that it is the will of the sovereign state thus to withdraw itself from the circle of civilized nations. It will be time enough to believe this to be its intention, when it formally announces that intention by appropriate enactments, edicts, or other declarations.

“ In regard to slavery within the British territories, there is a well known and clear promulgation of the will of the sovereign authority ; that is to say, there is a well known

rule of her law. As to England herself, that law has long existed ; and recent acts of parliament establish the same law for the colonies. The usual mode of stating the rule of English law, is, that no sooner does a slave reach the shore of England than he is free. This is true ; but it means no more than that when a slave comes within the exclusive jurisdiction of England he ceases to be a slave, because the law of England positively and notoriously prohibits and forbids the existence of such a relation between man and man. But it does not mean that English authorities, with this rule of English law in their hands, may enter where the jurisdiction of another nation is acknowledged to exist, and there destroy rights, obligations, and interests, lawfully existing under the authority of such other nation. No such construction, and no such effect, can be rightfully given to the British law. It is true that it is competent to the British parliament, by express statute provision, to declare that no foreign jurisdiction of any kind should exist in or over a vessel after its arrival voluntarily in her ports. And so she might close all her ports to the ships of all nations. A state may also declare, in the absence of treaty stipulations, that foreigners shall not sue in her courts, nor travel in her territories, nor carry away funds or goods received for debts. We need not inquire what would be the condition of a country that should establish such laws, nor in what relation they would leave her toward the states of the civilized world. Her power to make such laws is unquestionable ; but, in the absence of direct and positive enactments to that effect, the presumption is that the opposites of these things exist. While her ports are open to foreign trade, it is to be presumed that she expects foreign ships to enter them, bringing with them the jurisdiction of their own government, and the protection of its laws, to the same extent that her ships and the ships of other commercial states carry with them the jurisdiction of their respective governments into the open ports of the world ; just as it is presumed, while the contrary is not avowed, that stran-

gers may travel in a civilized country in a time of peace, sue in its courts, and bring away their property.

A merchant vessel enters the port of a friendly state, and enjoys while there the protection of her own laws, and is under the jurisdiction of her own government, not in derogation of the sovereignty of the place, but by the presumed allowance or permission of that sovereignty. This permission or allowance is founded on the comity of nations, like the other cases which have been mentioned ; and this comity is part, and a most important and valuable part, of the law of nations, to which all nations are presumed to assent until they make their dissent known. In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, their tacit adoption is presumed, to the usual extent. It is upon this ground that the courts of law expound contracts according to the law of the place in which they are made ; and instances almost innumerable exist, in which, by the general practice of civilized countries, the laws of one will be recognized and often executed in another. This is the comity of nations ; and it is upon this, as its solid basis, that the intercourse of civilized states is maintained.

“ But while that which has now been said is understood to be the voluntary and adopted law of nations, in cases of the voluntary entry of merchant vessels into the ports of other countries, it is nevertheless true, that vessels in such ports, only through an overruling necessity, may place their claim for exemption from interference on still higher principles ; that is to say, principles held in more sacred regard by the comity, the courtesy, or indeed the common sense of justice of all civilized states.

“ Even in regard to cases of necessity, however, there are things of an unfriendly and offensive character, which yet it may not be easy to say that a nation might not do. For example, a nation might declare her will to be, and make it the law of her dominions, that foreign vessels, cast away on her shores, should be lost to their owners, and

subject to the ancient law of wreck. Or a neutral state, while shutting her ports to the armed vessels of belligerents, as she has a right to do, might resolve on seizing and confiscating vessels of that description, which should be driven to take shelter in her harbours by the violence of the storms of the ocean. But laws of this character, however within the absolute competence of governments, could only be passed, if passed at all, under willingness to meet the last responsibility to which nations are subjected.

“The presumption is stronger, therefore, in regard to vessels driven into foreign ports by necessity, and seeking only temporary refuge, than in regard to those which enter them voluntarily, and for purposes of trade, that they will not be interfered with ; and that, unless they commit, while in port, some act against the laws of the place, they will be permitted to receive supplies, to repair damages, and to depart unmolested.

“If, therefore, vessels of the United States, pursuing lawful voyages, from port to port, along their own shore, are driven by stress of weather, or carried by unlawful force, into English ports, the government of the United States cannot consent that the local authorities in those ports shall take advantage of such misfortunes, and enter them, for the purpose of interfering with the condition of persons or things on board, as established by their own laws. If slaves, the property of citizens of the United States, escape into the British territories, it is not expected that they will be restored. In that case, the territorial jurisdiction of England will have become exclusive over them, and must decide their condition. But slaves on board of American vessels, lying in British waters, are not within the exclusive jurisdiction of England ; or under the exclusive operation of English law ; and this founds the broad distinction between the cases. If persons, guilty of crimes in the United States, seek an asylum in the British dominions, they will not be demanded, until provision for such cases be made by treaty : because the giving up of crimi-

nals, fugitive from justice, is agreed and understood to be a matter in which every nation regulates its conduct according to its own discretion. It is no breach of comity to refuse such surrender.

“On the other hand, vessels of the United States, driven by necessity into British ports, and staying there no longer than such necessity exists, violating no law, nor having intent to violate any law, will claim, and there will be claimed for them, protection and security, freedom from molestation, and from all interference with the character or condition of persons or things on board. In the opinion of the government of the United States, such vessels, so driven and so detained by necessity in a friendly port, ought to be regarded as still pursuing their original voyage, and turned out of their direct course only by disaster, or by wrongful violence; that they ought to receive all assistance necessary to enable them to resume that direct course; and that interference and molestation by the local authorities, where the whole voyage is lawful, both in act and intent, is ground for just and grave complaint.

“Your lordship’s discernment and large experience in affairs cannot fail to suggest to you how important it is to merchants and navigators engaged in the coasting trade of a country so large in extent as the United States, that they should feel secure against all but the ordinary causes of maritime loss. The possessions of the two governments closely approach each other. This proximity which ought to make us friends and good neighbours, may, without proper care and regulation, itself prove a ceaseless cause of vexation, irritation, and disquiet.

“If your lordship has no authority to enter into a stipulation by treaty for the prevention of such occurrences hereafter as have already happened, occurrences so likely to disturb that peace between the two countries which it is the object of your lordship’s mission to establish and confirm, you may still be so far acquainted with the sentiments of your government as to be able to engage that

instructions shall be given to the local authorities in the islands, which shall lead them to regulate their conduct in conformity with the rights of citizens of the United States, and the just expectations of their government, and in such manner as shall, in future, take away all reasonable ground of complaint. It would be with the most profound regret that the President should see that, while it is now hoped so many other subjects of difference may be harmoniously adjusted, nothing should be done in regard to this dangerous source of future collisions.

"I avail myself of this occasion to renew to your lordship the assurances of my distinguished consideration.

"DANIEL WEBSTER.

"Lord Ashburton, &c. &c. &c."

*Lord Ashburton to Mr. Webster.*

"Washington, August 6, 1842.

"Sir: You may be well assured that I am duly sensible of the great importance of the subject to which you call my attention in the note which you did me the honor of addressing me the 1st instant, in which you inform me that the President had been pleased to express his regret that I was not empowered by my government to enter into a formal stipulation for the better security of vessels of the United States, when meeting with disasters in passing between the United States and the Bahama islands, and driven by such disasters into British ports.

"It is, I believe, unnecessary that I should tell you that the case of the *Creole* was known in London a few days only before my departure. No complaint had at that time been made by Mr. Everett. The subject was not, therefore, among those which it was the immediate object of my mission to discuss. But at the same time I must admit that, from the moment I was acquainted with the facts of this case, I was sensible of all its importance, and I should not think myself without power to consider of some adjustment of, and remedy for, a great acknowledged difficulty,



if I could see my way clearly to any satisfactory course, and if I had not arrived at the conclusion, after very anxious consideration, that, for the reasons which I will state, this question had better be treated in London, where it will have a much increased chance of settlement, on terms likely to satisfy the interests of the United States.

“The immediate case of the Creole would be easily disposed of ; but it involves a class and description of cases which, for the purpose of affording that security you seek for the trade of America through the Bahama channel, brings into consideration questions of law, both national and international, of the highest importance ; and, to increase the delicacy and difficulty of the subject, public feeling is sensitively alive to every thing connected with it. These circumstances bring me to the conviction that, although I really believe that much may be done to meet the wishes of your government, the means of doing so would be best considered in London, where immediate reference may be had to the highest authorities, on every point of delicacy and difficulty that may arise. Whatever I might attempt would be more or less under the disadvantage of being fettered by apprehensions of responsibility, and I might thereby be kept within limits which my government at home might disregard. In other words, I believe you would have a better chance in this settlement with them than with me. I state this after some imperfect endeavours, by correspondence, to come at satisfactory explanations. If I were in this instance treating of ordinary material interests, I should proceed with more confidence ; but anxious as I unfeignedly am that all questions likely to disturb the future good understanding between us should be averted, I strongly recommend this question of the security of the Bahama channel being referred for discussion in London.

“This opinion is more decidedly confirmed by your very elaborate and important argument on the application of the general principles of the law of nations to these subjects—an argument to which your authority necessarily gives

great weight, but in which I would not presume to follow you with my own imperfect means. Great Britain and the United States, covering all the seas of the world with their commerce, have the greatest possible interest in maintaining sound and pure principles of international law, as well as the practice of reciprocal aid and good offices in all their harbours and possessions. With respect to the latter, it is satisfactory to know that the disposition of the respective governments and people leaves little to be desired, with the single exception of those very delicate and perplexing questions which have recently arisen from the state of slavery, and even these seem confined, and likely to continue to be confined, to the narrow passage of the Bahama channel. At no other part of the British possessions are American vessels with slaves ever likely to touch, nor are they likely to touch there otherwise than from the pressure of very urgent necessity. The difficulty, therefore, as well as the desired remedy, is apparently confined within narrow limits.

“Upon the great general principles affecting this case we do not differ. You admit that if slaves, the property of American citizens, escape into British territories, it is not expected that they will be restored; and you may be well assured that there is no wish on our part that they should reach our shores, or that British possessions should be used as decoys for the violators of the laws of a friendly neighbour.

“When these slaves do reach us, by whatever means, there is no alternative. The present state of British law is in this respect too well known to require repetition, nor need I remind you that it is exactly the same with the laws of every part of the United States where a state of slavery is not recognized; and that the slave put on shore at Nassau would be dealt with exactly as would a foreign slave landed, under any circumstances whatever, at Boston.

“But what constitutes the being within British dominion, from which these consequences are to follow? Is a vessel passing through the Bahama channel, and forced involun-

tarily, either from storm or mutiny, into British waters, to be so considered? What power have the authorities of those islands to take cognizance of persons or property in such vessels? These are questions which you, sir, have discussed at great length, and with evident ability. Although you have advanced some propositions which rather surprise and startle me, I do not pretend to judge them; but what is very clear is, that great principles are involved in a discussion which it would ill become me lightly to enter upon; and I am confirmed by this consideration in wishing that the subject be referred to where it will be perfectly weighed and examined.

"It behooves the authorities of our two governments well to guard themselves against establishing by their diplomatic intercourse false precedents and principles, and that they do not, for the purpose of meeting a passing difficulty, set examples which may hereafter mislead the world.

"It is not intended on this occasion to consider in detail the particular instances which have given rise to these discussions. They have already been stated and explained. Our object is rather to look to the means of future prevention of such occurrences. That this may be obtained, I have little doubt, although we may not be able immediately to agree on the precise stipulations of a treaty. On the part of Great Britain, there are certain great principles too deeply rooted in the consciences and sympathies of the people for any minister to be able to overlook; and any engagement I might make in opposition to them would be instantly disavowed; but, at the same time that we maintain our own laws within our own territories, we are bound to respect those of our neighbours, and to listen to every possible suggestion of means of averting from them every annoyance and injury. I have great confidence that this may be effectually done in the present instance; but the case to be met and remedied is new, and must not be too hastily dealt with. You may, however, be assured that

measures so important, for the preservation of friendly intercourse between the two countries shall not be neglected.

"In the mean time, I can engage that instructions shall be given to the governors of her majesty's colonies on the southern borders of the United States to execute their own laws with careful attention to the wish of their government to maintain good neighbourhood, and that there shall be no officious interference with American vessels driven by accident or by violence into those ports. The laws and duties of hospitality shall be executed, and these seem neither to require nor to justify any further inquisition into the state of persons or things on board of vessels so situated, than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbors and waters.

"A strict and careful attention to these rules, applied in good faith to all transactions as they arise, will, I hope and believe, without any abandonment of great and general principles, lead to the avoidance of any excitement or agitation on this very sensitive subject of slavery, and, consequently, of those irritating feelings which may have a tendency to bring into peril all the great interests connected with the maintenance of peace.

"I further trust that friendly sentiments, and a conviction of the importance of cherishing them, will, on all occasions, lead the two countries to consider favourably any further arrangements which may be judged necessary for the reciprocal protection of their interests.

"I hope, sir, that this explanation on this very important subject will be satisfactory to the President, and that he will see in it no diminution of that earnest desire, which you have been pleased to recognize in me, to perform my work of reconciliation and friendship; but that he will rather perceive in my suggestion, in this particular instance, that it is made with a well founded hope of thereby better obtaining the object we have in view.

"I beg to renew to you, sir, the assurances of my high consideration.

"ASHBURTON.

"Hon. Daniel Webster, &c. &c. &c."

*Mr. Webster to Lord Ashburton.*

"Department of State, Washington, August 8, 1842.

"My lord: I have the honour to acknowledge the receipt of your lordship's note of the 6th instant, in answer to mine of the 1st, upon the subject of a stipulation for the better security of American vessels driven by accident or carried by force into the British West India ports.

"The President would have been gratified if you had felt yourself at liberty to proceed at once to consider of some proper arrangement, by formal treaty, for this object: but there may be weight in the reasons which you urge for referring such mode of stipulation for consideration in London.

"The President places his reliance on those principles of public law which were stated in my note to your lordship, and which are regarded as equally well founded and important; and on your lordship's engagement that instructions shall be given to the governors of her majesty's colonies to execute their own laws with careful attention to the wish of their government to maintain good neighbourhood, and that there shall be no officious interference with American vessels driven by accident or by violence into those ports; that the laws and duties of hospitality shall be executed, and that these seem neither to require nor to justify any further inquisition into the state of persons or things on board of vessels so situated than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbors and waters. He indulges the hope, nevertheless, that, actuated by a just sense of what is due to the mutual interests of the two countries, and the maintenance of a permanent peace between them, her majesty's government will not fail to see

the importance of removing, by such further stipulations, by treaty or otherwise, as may be found to be necessary, all cause of complaint connected with this subject.

"I have the honor to be, with high consideration, your lordship's obedient servant,

"DANIEL WEBSTER.

"Lord Ashburton, &c., &c., &c."

The subject of impressment, which was one of the principal causes of the war commenced in 1812 between the United States and Great Britain, was not included among the subjects of negotiation at the treaty of Washington. But the following correspondence on that question, which took place between the negotiators, is inserted as a document of great importance in the history of public law.

*Mr. Webster to Lord Ashburton.*

Department of State, Washington, August 8, 1842.

"My lord: We have had several conversations on the subject of impressment, but I do not understand that your lordship has instructions from your government to negotiate upon it, nor does the government of the United States see any utility in opening such negotiation, unless the British government is prepared to renounce the practice in all future wars.

"No cause has produced, to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England as the impressment of seamen by British cruisers from American merchant vessels.

"From the commencement of the French Revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right claimed, and to the practice exercised under it, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right

itself had been admitted, took possession of the public mind of America, and this feeling, it is well known, coöperated most powerfully with other causes to produce the state of hostilities which ensued.

“At different periods, both before and since the war, negotiations have taken place between the two governments, with the hope of finding some means of quieting these complaints. At some times, the effectual abolition of the practice has been requested and treated of; at other times, its temporary suspension; and, at other times again, the limitation of its exercise and some security against its enormous abuses.

“A common destiny has attended these efforts; they have all failed. The question stands at this moment where it stood fifty years ago. The nearest approach to a settlement was a convention proposed in 1803, and which had come to the point of signature, when it was broken off in consequence of the British government insisting that the *narrow seas* should be expressly excepted, out of the sphere over which the contemplated stipulations against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

“England asserts the right of impressing British subjects, in time of war, out-of neutral merchant vessels, and of deciding by her visiting officers, who, among the crews of such merchant vessels, are British subjects. She asserts this as a legal exercise of the prerogative of the crown; which prerogative is alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation, under all circumstances, and for his whole life, to render military service to the crown whenever required.

“This statement, made in the words of eminent British jurists, shows, at once, that the English claim is far broader than the basis or platform on which it is raised. The

law relied on is English law ; the obligations insisted on are obligations existing between the crown of England and its subjects. This law and these obligations, it is admitted, may be such as England may choose they shall be. But then they must be confined to the parties. Impressment of seamen, out of and beyond English territory, and from on board the ships of other nations, is an interference with the rights of other nations ; is further, therefore, than English prerogative can legally extend ; and is nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserts an extra-territorial authority for the law of British prerogative, and assumes to exercise this extra-territorial authority, to the manifest injury and annoyance of the citizens and subjects of other states, on board their own vessels on the high seas.

“ Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry, therefore, into such vessel, being neutral, by a belligerent, is an act of force, and is, *prima facie*, a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations. But a British cruiser enters an American merchant vessel in order to take therefrom supposed British subjects ; offering no justification therefor, under the law of nations, but claiming the right under the law of England respecting the king's prerogative. This can not be defended. English soil, English territory, English jurisdiction, is the appropriate sphere for the operation of English law. The ocean is the sphere of the law of nations ; and any merchant vessel on the seas is, by that law, under the protection of the laws of her own nation, and may claim immunity, unless in cases in which that law allows her to be entered or visited.

“ If this notion of perpetual allegiance, and the consequent power of the prerogative, was the law of the world ; if it formed part of the conventional code of nations, and



was usually practised like the right of visiting neutral ships, for the purpose of discovering and seizing enemy property, then impressment might be defended as a common right, and there would be no remedy for the evil till the national code should be altered. But this is by no means the case. There is no such principle incorporated into the code of nations. The doctrine stands only as English law—not as national law ; and English law can not be of force beyond English dominion. Whatever duties or relations that law creates between the sovereign and his subjects, can be enforced and maintained only within the realm, or proper possessions or territory of the sovereign. There may be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the state ; but no government thinks of controlling by its own laws, property of its subjects situated abroad ; much less does any government think of entering the territory of another power for the purpose of seizing such property and applying it to its own uses. As laws, the prerogatives of the crown of England have no obligation on persons or property domiciled or situated abroad.

“ ‘ When, therefore,’ says an authority not unknown or unregarded on either side of the Atlantic, ‘ we speak of the right of a state to bind its own native subjects every where, we speak only of its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws, on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will and public polity.’

“ The good sense of these principles, their remarkable pertinency to the subject now under consideration, and the extraordinary consequences resulting from the British doctrine, are signally manifested by that which we see taking place every day. England acknowledges herself over

burdened with population of the poorer classes. Every instance of the emigration of persons of those classes is regarded by her as a benefit. England, therefore, encourages emigration ; means are notoriously supplied to emigrants to assist their conveyance, from public funds ; and the new world, and most especially these United States, receive the many thousands of her subjects thus ejected from the bosom of their native land by the necessities of their condition. They come away from poverty and distress, in over crowded cities, to seek employment, comfort, and new homes, in a country of free institutions, possessed by a kindred race, speaking their own language, and having laws and usages in many respects like those to which they have been accustomed ; and a country which, upon the whole, is found to possess more attractions for persons of their character and condition than any other on the face of the globe. It is stated that in the quarter of the year ending with June last, more than twenty-six thousand emigrants left the single port of Liverpool for the United States, being four or five times as many as left the same port within the same period for the British colonies and all other parts of the world. Of these crowds of emigrants, many arrive in our cities in circumstances of great destitution, and the charities of the country, both public and private, are severely taxed to relieve their immediate wants. In time they mingle with the new community in which they find themselves, and seek means of living ; some find employment in the cities, others go to the frontiers, to cultivate lands reclaimed from the forest ; and a greater or less number of the residue, becoming in time naturalized citizens, enter into the merchant service, under a flag of their adopted country.

“ Now, my lord, if war should break out between England and a European power, can anything be more unjust, anything more irreconcilable to the general sentiments of mankind, than that England should seek out these persons, thus encouraged by her, and compelled by their own condi-

tion to leave their own native homes, tear them away from their new employments, their new political relations, and their domestic connections, and force them to undergo the dangers and hardships of military service, for a country which has thus ceased to be their own country? Certainly, certainly, my lord, there can be but one answer to this question. Is it not far more reasonable that England should either prevent such emigration of her subjects, or that, if she encourage and promote it, she should leave them, not to the embroilment of a double and a contradictory allegiance, but to their own voluntary choice, to form such relations, political or social, as they see fit, in the country where they are to find their bread, and to the laws and institutions of which they are to look for defence and protection?

“A question of such serious importance ought now to be put at rest. If the United States give shelter and protection to those whom the policy of England annually casts upon their shores—if, by the benign influences of their government and institutions, and by the happy condition of the country, those emigrants become raised from poverty to comfort, finding it easy even to become landholders, and being allowed to partake in the enjoyment of all civil rights—if all this may be done (and all this is done, under the countenance and encouragement of England herself,) is it not high time, my lord, that, yielding that which had its origin in feudal ideas as inconsistent with the present state of society, and especially with the intercourse and relations subsisting between the old world and the new, England should, at length, formally disclaim all right to the services of such persons, and renounce all control over their conduct?

“But impressment is subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remains true that, in its exercise, it touches the political rights of other governments, and endangers the security of

their own native subjects and citizens. The sovereignty of the state is concerned in maintaining its exclusive jurisdiction and possession over its merchant ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience has shown that no member of a crew, wherever born, is safe against impressment when a ship is visited.

"The evils and injuries resulting from the actual practice can hardly be overstated, and have ever proved themselves to be such as should lead to its relinquishment, even if it were founded in any defensible principle. The difficulty of discriminating between English subjects and American citizens has always been found to be great, even when an honest purpose of discrimination has existed. But the lieutenant of a man-of-war, having necessity for men, is apt to be a summary judge, and his decisions will be quite as significant of his own wants and his own power as of the truth and justice of the case. An extract from a letter of Mr. King, of the 13th of April, 1797, to the American secretary of state, shows something of the enormous extent of these wrongful seizures :

" 'Instead of a few, and these in many instances equivocal cases, I have,' says he, 'since the month of July past, made application for the discharge, from British men-of-war, of two hundred and seventy-one seamen, who, stating themselves to be Americans, have claimed my interference. Of this number eighty-six have been ordered, by the admiralty to be discharged, thirty-seven more have been detained as British subjects or as American volunteers, or for want of proof—that they are Americans, and to my applications for the discharge of the remaining one hundred and forty-eight, I have received no answer—the ships on board of which these seamen were detained having, in many instances, sailed before an examination was made in consequence of my application.

" 'It is certain that some of those who have applied to me are not American citizens, but the exceptions are, in

my opinion, few, and the evidence, exclusive of certificates, has been such as, in most cases, to satisfy me that the applicants were real Americans, who have been forced into the British service, and who, with singular constancy, have generally persevered in refusing pay or bounty, though in some instances they have been in service more than two years.'

"But the injuries of impressment are by no means confined to its immediate subjects or the individuals on whom it is practiced. Vessels suffer from the weakening of their crews, and voyages are often delayed, and not unfrequently broken up, by subtraction from the number of necessary hands by impressment. And what is still of greater and more general moment, the fear of impressment has been found to create great difficulty in obtaining sailors for the American merchant service in times of European war. Seafaring men, otherwise inclined to enter into that service, are, as experience has shown, deterred by the fear of finding themselves ere long in compulsory military service in British ships of war. Many instances have occurred, fully established in proof, in which raw seamen, natives of the United States, fresh from the fields of agriculture, entering for the first time on shipboard, have been impressed before they made the land, placed on the decks of British men-of-war, and compelled to serve for years before they could obtain their release, or revisit their country and their homes. Such instances become known, and their effect in discouraging young men from engaging in the merchant service of their country can neither be doubted nor wondered at. More than all, my lord, the practice of impressment, whenever it has existed, has produced not conciliation and good feeling, but resentment, exasperation, and animosity, between the two great commercial countries of the world.

"In the calm and quiet which have succeeded the late war—a condition so favourable for dispassionate consideration—England herself has evidently seen the harshness of impressment, even when exercised on seamen in her

own merchant service, and she has adopted measures calculated, if not to renounce the power or to abolish the practice, yet, at least, to supersede its necessity by other means of manning the royal navy, more compatible with justice and the rights of individuals, and far more conformable to the spirit and sentiments of the age.

“Under these circumstances, the government of the United States has used the occasion of your lordship’s pacific mission to review this whole subject, and to bring it to your notice and that of your government. It has reflected on the past, pondered the condition of the present, and endeavoured to anticipate, so far as might be in its power, the probable future ; and I am now to communicate to your lordship the result of these deliberations.

“The American government, then, is prepared to say that the practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to.

“In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that ‘the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.’

“Fifty years’ experience, the utter failure of many negotiations, and a careful reconsideration now had, of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule, which can be adopted and observed, consistently with the rights and honour of the United States and the security of their citizens. That rule announces therefore, what will hereafter be the principle maintained by their government. In every

regularly documented American merchant vessel the crew who navigate it will find their protection in the flag which is over them.

"This announcement is not made, my lord, to revive useless recollections of the past, nor to stir the embers from fires which have been, in a great degree, smothered by many years of peace. Far otherwise. Its purpose is to extinguish those fires effectually, before new incidents arise to fan them into flame. The communication is in the spirit of peace, and for the sake of peace, and springs from a deep and conscientious conviction that high interests of both nations require that this so long contested and controverted subject should now be finally put to rest. I persuade myself, my lord, that you will do justice to this frank and sincere avowal of motives, and that you will communicate your sentiments, in this respect, to your government.

"This letter closes, my lord, on my part, our official correspondence; and I gladly use the occasion to offer you the assurance of my high and sincere regard.

"DANIEL WEBSTER.

"Lord Ashburton, &c., &c., &c.,"

*Lord Ashburton to Mr. Webster.*

"Washington, August 9, 1842.

"Sir: The note you did me the honour of addressing me the 8th instant, on the subject of impressment, shall be transmitted without delay to my government, and will, you may be assured, received from them the deliberate attention which its importance deserves.

"The object of my mission was mainly the settlement of existing subjects of difference, and no differences have or could have arisen of late years with respect to impressment, because the practice has since the peace wholly ceased and cannot, consistently with existing laws and regulations for manning her majesty's navy, be, under the present circumstances, renewed.

'Desirous, however, of looking far forward into futurity

to anticipate even possible causes of disagreement, and sensible of the anxiety of the American people on this grave subject of past irritation, I should be sorry in any way to discourage the attempt at some settlement of it; and, although without authority to enter upon it here during the limited continuance of my mission, I entertain a confident hope that this task may be accomplished, when undertaken, with the spirit of candor and conciliation which has marked all our late negotiations.

"It not being our intention to endeavour now to come to any agreement on this subject, I may be permitted to abstain from noticing, at length, your very ingenious arguments relating to it, and from discussing the graver matters of constitutional and international law growing out of them. These sufficiently show that the question is one requiring calm consideration; though I must, at the same time, admit that they prove a strong necessity of some settlement for the preservation of that good understanding which, I trust, we may flatter ourselves that our joint labours have now succeeded in establishing.

"I am well aware that the laws of our two countries maintain opposite principles respecting allegiance to the sovereign. America, receiving every year, by thousands, the emigrants of Europe, maintains the doctrine suitable to her condition of the right of transferring allegiance at will. The laws of Great Britain have maintained, from all time, the opposite doctrine. The duties of allegiance are held to be indefeasible, and it is believed that this doctrine, under various modifications, prevails in most, if not in all, the civilized states of Europe.

"Emigration, the modern mode by which the population of the world peaceably finds its level, is for the benefit of all, and eminently for the benefit of humanity. The fertile deserts of America are gradually advancing to the highest state of cultivation and production, while the emigrant acquires comfort which his own confined home could not afford him.



"If there were anything in our laws or our practice on either side tending to impede this march of providential humanity, we could not be too eager to provide a remedy ; but as this does not appear to be the case, we may safely leave this part of the subject without indulging in abstract speculations, having no material practical application to matters in discussion between us.

"But it must be admitted that a serious practical question does arise, or rather has existed, from practices formerly attending the mode of manning the British navy in times of war. The principle is, that all subjects of the crown are in case of necessity bound to serve their country, and the sea-faring man is naturally taken for the naval service. This is not, as is sometimes supposed, any arbitrary principle of monarchical government, but one founded on the natural duty of every man to defend the life of his country ; and all the analogy of your laws would lead to the conclusion that the same principle would hold good in the United States if their geographical position did not make its application unnecessary.

"The very anomalous condition of the two countries with relation to each other here creates a serious difficulty. Our people are not distinguishable ; and owing to the peculiar habits of sailors, our vessels are very generally manned from a common stock. It is difficult, under these circumstances, to execute laws which at times have been thought to be essential for the existence of the country, without risk of injury to others. The extent and importance of those injuries, however, are so formidable that it is admitted that some remedy should, if possible, be applied ; at all events, it must be fairly and honestly attempted. It is true that during the continuance of peace no practical grievance can arise ; but it is also true that it is for that reason the proper season for the calm and deliberate consideration of an important subject. I have much reason to hope that a satisfactory arrangement respecting it may be made, so as to set at rest all apprehension and

anxiety ; and I will only further repeat the assurance of the sincere disposition of my government favourably to consider all matters having for their object the promoting and maintaining undisturbed kind and friendly feelings with the United States.

" I beg, sir, on this occasion of closing the correspondence with you connected with my mission, to express the satisfaction I feel at its successful termination, and to assure you of my high consideration and personal esteem and regard.

" ASHBURTON.

" Hon. Daniel Webster, &c., &c., &c."

The treaty of Washington also contained a stipulation, (art. 1.) for the final adjustment of the northern and north-eastern boundary, separating the United States from the British dominions in North America, which had remained a subject of dispute between the French and British governments from the treaty of Utrecht, 1713, and so long as France remained in possession of Canada, and between the American and British governments ever since the treaty of peace of 1783. This controversy was finally settled by the substitution of a conventional line for that stipulated by the 2d article of the treaty of 1783, with certain equivalents and compensations deemed equitable between the parties.

The progress made by the law of nations in Europe and America since the French Revolution of 1789 may be traced in the practical discussions and polemic controversies relating to the numerous and important questions growing out of the consequences of that great event, rather than in the systematical treatises of institutional writers upon the science of international jurisprudence. We have already noticed the elementary treatise of Martens upon the positive law of nations of which the first edition was published previous to the French revolution.\* The same author sub-

§ 35. Public  
Jurists of this  
Period.

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\* Vide Part Third, § 20.

sequently enriched the science of external public law with several other justly esteemed works. Other names might be cited, more or less celebrated, of compilers who have taken for the basis of their works the treatise of Vattel ; but it cannot be said that these authors have sensibly contributed to the progress of this branch of science, although they may have facilitated its study by a better arrangement of the scattered materials, which, in the words of Sir James Mackintosh, "called for the skill of a new builder." The name of this distinguished man might have formed an exception to this general remark, had he completed and given to the world his course of lectures on the law of nature and nations, of which the introductory discourse is so justly esteemed for profound thought, vast range of information, and admirable felicity of language. This course of lectures, delivered in Lincoln's Inn Hall in 1797, attracted at first an audience of the most distinguished statesmen and lawyers, and of the most learned and accomplished persons of the metropolis. "The subject, however," we are told by his biographer, "was unattractive to an English auditory, who have no taste for inquiries essentially speculative, which neither admit of demonstrative certainty, nor practical results. Accordingly the lectures of Sir James, although they continued to be praised, ceased to be followed." On the continent such speculations are more highly prized. Several writers of the different schools of German philosophy during this period sought to illustrate the theory of international law, considered as a branch of universal jurisprudence, and proposed, as the result of their meditations on its present imperfect state, the establishment of an Amphictyonic council of nations, by which their mutual differences might be judicially determined, and the guilt and misery of war forever abolished among civilized nations.

§ 36. Kant,  
Project of per-  
petual peace.

One of the most remarkable of these projects of perpetual peace was that published by Kant in 1795, soon after the conclusion of the treaty of peace at Basle by which

Prussia retired from the continental coalition against the French republic, and guaranteed the neutrality of the other states of northern Germany. The scheme proposed by the philosopher of Königsberg was grounded on the same idea of a general confederation of European nations which had been successively conceived by Saint Pierre, Rousseau, and Bentham.

Kant develops this idea by laying down as the first condition of perpetual peace that the constitution of every state adhering to the proposed league should be *republican*, which he defines to be that form of government where every citizen participates by his representatives in the exercise of the legislative power, and especially in that of deciding on the questions of peace and war. A declaration of war decreed in this manner by the nation is in effect decreeing against itself all the calamities and burdens of war. On the other hand, under a constitution of government where the subjects are not citizens, that is under a constitution which is not republican, a declaration of war may be rashly pronounced on insufficient grounds, because it costs nothing to the national chief, who is the master, and not a member of the state,—not even the sacrifice of his smallest pleasures. But, according to Kant, a republican form must not be confounded with a democratic form of government. By a republican constitution, he understands any form of government limited by a popular representation, the legislative power being separated from the executive, and the authority to declare war being included in the former. According to his view, democracy excludes representation. It is inevitably despotic, the will of a majority of the sovereigns of which it is composed being unlimited; whilst aristocracy, or even autocracy, although defective inasmuch as they are liable to become despotic by substituting the single will of the chief or chiefs of the state to the general will, still admit the possibility of a representative administration, as Frederick the Great intimated when he said he was “the first servant of the state.” Not one of the pre-

tended republics of antiquity possessed, or even had a knowledge of the representative system. They accordingly all terminated in the least insupportable form of despotism, that of a single individual.

The second condition of a perpetual peace, according to Kant, is that the public law of Europe should be founded upon a confederation of free states. In the existing system of international relations, the state of nature, which has ceased as between individuals, whilst it still subsists as between nations, is not a state of peace, but of war, if not flagrant, at least always ready to break out. The code expounded by public jurists to nations has never had the obligatory force of law, properly so called, for want of an adequate coercive sanction. The field of battle is the only tribunal where states plead for their rights; but victory, which ends the litigation, does not finally decide the controversy. The treaty of peace which may follow is, in effect, a mere suspension of arms, the contending parties still remaining in a state of hostility towards each other, without being subject to the reproach of injustice, since each party is the exclusive judge in its own cause. The state of peace, must, consequently, ever remain insecure, unless guarantied by a special compact having for its object the perpetual abolition of war. Nations must renounce as individuals have renounced, the anarchical freedom of savages, and submit themselves to coercive laws, thus forming a community of nations, *civitas gentium*, which may ultimately be extended so as to include all the people of the earth. "It may be demonstrated," says our author, "that the idea of a confederation which shall gradually extend to all states, and thus lead them insensibly to universal and perpetual peace, is not an impracticable or visionary idea. It may be realized, if happily a single nation, equally powerful and enlightened, could once constitute itself as a republic, a form of government naturally inclined to perpetual peace. A common centre would thus be created for this federative association, around which other

states would cluster in order to secure their liberties according to the principles of public law, and this alliance would finally become universal."

He concludes that "if it be a duty to cherish the hope that the universal dominion of public law may ultimately be realized, by a gradual but continued progress, the establishment of perpetual peace to take the place of those mere suspensions of hostility called treaties of peace, is not a mere chimera, but a problem, of which time, abridged by the uniform and continual progress of the human mind, will ultimately furnish a satisfactory solution."<sup>b</sup>

In his metaphysics of jurisprudence published in 1797, treating of the science of international law in general, Kant insists upon the same views as to the practicability of a perpetual peace. In this work he observes, "that the natural state of nations, being like that of individuals, a state which must be abandoned in order to enter into a social state sanctioned by law, every right acquired by war previous to this transition must be considered as provisional merely, until confirmed by a general union of independent states, analogous to that association of individuals which forms each separate state. The establishment of perpetual peace, which ought to be considered as the ultimate object of every system of public law, may perhaps be considered as impracticable, inasmuch as the too great extension of such a federal union might render impossible that supervision over its several members and that protection to each member which is essential to its ends. But the establishment of those principles which tend to further this object, by forming such alliances between different states as may gradually lead to its accomplishment, is by no means an impracticable idea, since it is grounded upon the rights and the duties of men and of states.

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<sup>b</sup> *Projet de paix perpetuelle, essai philosophique par Emanuel Kant. Traduit de l'allemand avec un Nouveau Supplément de l'auteur, Koenigsberg, 1796.*

"Such a general association of states, having for its object the preservation of peace, might be termed the permanent congress of nations. Such was the diplomatic conference formed at the Hague during the first part of the eighteenth century, with a similar view, consisting of the ministers of the greater part of the European courts and even of the smallest republics. In this manner all Europe was constituted into one federal state, of which the several members submitted their differences to the decision of this conference as their sovereign arbiter. Since that epoch the law of nations may be said to have remained in the books of the public jurists a dead letter without practical influence on the actual conduct of governments, or else has been invoked when too late to correct the irreparable evils inflicted by the abuse of force.

"What we mean to propose is a general congress of nations, of which both the meeting and the duration are to depend entirely on the sovereign wills of the several members of the league, and not an indissoluble union like that which exists between the several states of North America founded on a municipal constitution. Such a congress and such a league are the only means of realizing the idea of a true public law, according to which the differences between nations would be determined by civil proceedings as those between individuals are determined by civil judicature, instead of resorting to war, a means of redress worthy only of barbarians."<sup>c</sup>

§ 37. Hegel. The principles of Kant on this subject are contested by another celebrated German philosopher, Hegel. According to the last named author, the sovereign independence of the state is the greatest good which men can enjoy as a consequence of the formation of a social union. The

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<sup>c</sup> Kant, *Rechtslehre*, Zweiten Theil, § 61. That part of this work relating to international law was translated into French and published at Paris in 1814, under the title of, "*Traité du droit des gens, dédié aux puissances alliées et leurs ministres, extrait d'un ouvrage de Kant.*"

highest duty of a citizen is to sacrifice to the preservation of this independence his life, his property, his personal will, in a word all his possessions. That can only be considered as a very limited and one sided view which induces us to regard the state merely as a civil association, the sole object of which is to secure the lives and property of its members, since it is evident that the security of these benefits cannot be effected by the loss of that which is to be secured. War ought not to be considered as an absolute evil, and as an accidental event, the origin of which is to be attributed to the passions of princes and people, in a word to that which *ought not to be*. War is that state of things in which the hacknied phrase of the vanity of temporal goods becomes a reality, a state of things in which the moral health of nations is preserved by action, as the movements of the winds and waves preserve the sea from that complete stagnation which a perpetual calm would necessarily produce. A state of perpetual peace, if it could be realized, would produce a like moral stagnation among nations. History testifies that war strengthens the force of a people by directing its activity towards external objects, and in this manner preventing internal dissensions. Perpetual peace is often held up as a state of ideal perfection for the attainment of which humanity should perpetually strive. It was with this view that Kant proposed the formation of a general confederacy of princes and states for the adjustment of their mutual differences. The league called the Holy Alliance was founded in our own times with the same intention. But, says Hegel, a state is an individual, and the idea of negation is essentially implied in that of individuality. If then a considerable number of sovereign states were to unite in order to form, as it were, a family of nations, this association, as an individuality, would necessarily create opposition and hostility among the states excluded from the alliance. We often hear from the sacred desk eloquent declamations upon the vanity and instability of temporal goods ; but however af-



sected the hearer may be with the voice of the preacher every one says to himself that he will strive to keep whatever share belongs to him of these fleeting blessings. Let this instability of human affairs be brought home to men's conditions in the shape of hussars with drawn swords, and humble edification is changed into loud imprecations against the cruelty and injustice of conquerors. Wars do not occur the less frequently whenever the causes which produce them are put in operation, and the declamation of preachers and the dreams of philosophers are thus falsified by the reiterated lessons of history.

In almost every European state, continues this author, the direction of its external affairs is confided to the prince invested with the sovereign power of the nation. As chief of the state, he is exclusively invested with the authority of maintaining its relations with foreign powers, of declaring war, directing its operations, and concluding treaties of peace. It is nevertheless true that in constitutional governments the legislative chambers may participate in the exercise of the power of making war and peace, either directly, or indirectly in voting the budget. In England, for example, where the crown exercises these sovereign powers, no war can be commenced or continued without the consent of parliament. But if it be asserted that princes and cabinets are more liable to be influenced by prejudice and passion than popular assemblies, and if for this reason it be proposed to confide exclusively to these bodies the war-making power, it may be answered that the people are quite as liable to be carried away by gusts of passion and influenced by groundless prejudices as kings and princes. Thus England has often been involved in war against the true interests of the nation by popular clamour acting on the government with too much force to be resisted. The popularity of the younger Pitt was founded upon his skill in adapting his measures to the wishes of the nation and to the actual state of public opinion. These were at first favourable to the war commenced by him against France.

It was only when the public enthusiasm began to cool that the nation became convinced that the war had been undertaken without necessity and carried on without advantage.

According to Hegel, the fundamental principle of international law, considered as that universal law which should prevail between states, in contradistinction to the particular stipulation of positive compacts, is the faithful observance of treaties as morally binding upon the contracting parties. But as the mutual relations between states are founded upon their separate sovereignty, they still remain in what is called a state of nature with respect to each other. Their mutual rights are not guaranteed by any superiour authority. Their rights depend upon their separate wills. There is no supreme judge and sovereign arbiter between states. Such a supreme judge and sovereign arbiter can only be constituted by special compacts dependent for their execution upon the separate sovereign wills of the contracting parties. The conception of Kant relating to a perpetual peace, resting upon the basis of an association of states, with power to decide as a supreme authority recognized by all the members of the league, upon all controversies between them, and to prevent the termination of these controversies by arms, necessarily supposes the consent of the associated states. But as the duration of this consent, founded upon whatever religious and moral considerations it may be, depends upon the separate wills of these several states, it is ever subject to be interrupted. The controversies between sovereign states can therefore only be decided by war, unless their separate sovereign wills concur in some agreement for the settlement of these controversies. The great and insurmountable difficulty must ever be to determine what are the acts, which in the complicated relations of nations, are to be considered as violating the obligation of treaties, the acknowledged independence, or the national honor of a particular state. Every state may consider its honor and security as depending upon circumstances infinitely varying, of which it alone

is the exclusive judge, and which are often aggravated by the susceptibility of the nation and its earnest desire to direct its activity towards external aggrandizement. The reality of the provocation to hostilities may often depend upon conjectures, or a calculation of the probabilities of an eventual danger against which it is necessary to provide.

Hegel terminates this part of his work, by stating that the principle of the mutual recognition of sovereign states subsists even in time of war. The relation of enemies is transitory, and the law of nations always supposes the possibility, and even the hope of the restoration of peace. From this supposition is derived the usage of limiting the extreme rights of war to the combatants only, and of exempting therefrom the persons and property of private individuals who take no part in the contest. This usage, as well as that of exchanging prisoners, of respecting the privileges of ambassadors, and of observing conventions of truce, have all derived their origin from that identity of race, of legislation, of manners, and of civilization, which has formed the nations of Europe into one great family. It is in this manner that the conduct of these nations in their mutual relations is modified during war, where else there would be no other rule than that of doing each other as much harm as possible. The mutual intercourse of the citizens of different countries in time of peace is regulated by the same principles. Nevertheless the relations of amity are subject to continual fluctuations and may be suddenly interrupted by unforeseen accidents. In this case there is no other ultimate arbiter and judge between sovereign states than the universal, self-existing spirit who animates and rules the universe.<sup>d</sup>

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<sup>d</sup> Hegel, *Grundeinien der Philosophie des Rechts*, herausgegeben von Gans, §§ 321-339.

## CONCLUSION.

WE have thus endeavoured to trace the progress of the law of nations in Europe and America since the peace of Westphalia. The general results of this retrospect may be summed up as follows :

That the pacific relations among nations have been maintained by the general establishment of permanent missions, and the general recognition of the immunities of public ministers.

Although the right of intervention to preserve the balance of power, or to prevent the dangers to which one country may be exposed by the domestic transactions of another, has been frequently assumed ; yet no general rules have been discovered by which the occasions which may justify the exercise of this right, or the extent to which it may be carried, can be laid down ; and that it remains, therefore, an undefined and undefinable exception to the mutual independence of nations.

The exclusive dominion, claimed by certain powers over particular seas, has been abandoned as an obsolete pretension of barbarous times ; the general use of the high seas, without the limits of any particular state, for the purposes of navigation, commerce, and fishery, has been conceded ; and the right of search on the ocean limited to periods of war except certain conventional arrangements applicable to the African slave trade.

The navigation of the river Scheldt, which was closed by the treaty of Westphalia in favour of the commerce of Holland, has been reopened to all nations ; and the general right to navigate the Rhine, the Elbe, the Danube, and other rivers, which separate, or pass through different states, has been recognized as a part of the public law of Europe.

The colonial monopoly, that fruitful source of wars, has nearly ceased ; and with it, the question as to the right of

neutrals to enjoy in war a commerce prohibited in time of peace.

The African slave trade has been condemned by the opinion of all Christian nations, and prohibited by their separate laws, or by mutual treaty stipulations between them.

The practices of war between civilized nations have been sensibly mitigated, and a comparison of the present modes of warfare with the system of Grotius will show the immense improvement which has taken place in the laws of war.

Although there is still some uncertainty as to the rights of neutral navigation in time of war, a conventional law has been created by treaty, which shows a manifest advance towards securing the commerce of nations which remain at peace, from interruption by those which are engaged in war.

The sphere, within which the European law of nations operates, has been widely extended by the unqualified accession of the new American states; by the tendency of the Mahomedan powers to adopt the public law of Christendom; and by the general feeling, even among less civilized nations, that there are rights which they may exact from others, and, consequently, duties which they may be required to fulfil.

The law of nations, as a science, has advanced with the improvements in the principles and language of philosophy; with our extended knowledge of the past and present condition of mankind resulting from deeper researches into the obscurer periods of history and the discovery of new regions of the globe; and with the greater variety and importance of the questions to which the practical application of the system has given rise.

And lastly, that the law of nations, as a system of positive rules regulating the mutual intercourse of nations, has improved with the general improvement of civilization, of which it is one of the most valuable products.

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